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JEANNE HICKS, CLERK

BY: S Smisko ✓

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

THE STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.)
)
STEVEN CARROLL DEMOCKER,)
)
Defendant.)
)

P1300
No. ✓ CR 2008-1339

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
TUESDAY, NOVEMBER 17, 2009
8:57 A.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
HEARING ON MOTIONS

ALLOCUTION BY CHARLOTT AND KATHERINE DEMOCKER

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

NOVEMBER 17, 2009
8:57 A.M.

HEARING ON MOTIONS

APPEARANCES:

FOR THE STATE, MR. JOE BUTNER.

FOR THE DEFENDANT, MR. JOHN SEARS, MR. LARRY
HAMMOND, AND MS. ANN CHAPMAN.

FOR CHARLOTT AND KATHERINE DEMOCKER, MR. CHRIS
DUPONT.

THE COURT: This is State versus Steven
Carroll DeMocker, CR 2008-1339. Mr. DeMocker is present and
is in custody with Mr. Sears representing him.
Mr. DeMocker's other counsel are also present. Mr. Butner is
here for the State.

We are set for hearing of various motions
that have been filed. The first one that I would like to
take up is Chris Dupont filed a request for the Court to
allow the DeMocker children to allocute with regard to the
release motion that I still have under advisement.

Is Mr. Dupont here?

MR. DUPONT: Yes. Good morning, Your Honor.

THE COURT: Good morning. Sorry I didn't
recognize you.

Did you have one that was here? Are both
here?

MR. DUPONT: Your Honor, Charlott is here, and
Katherine is available by phone. I think I filed a separate

1 request that she be allowed to allocute telephonically.

2 THE COURT: I don't have a problem with that,
3 but do you have a number? And I am not sure to what extent
4 our clerk can set that up.

5 MR. DUPONT: I did get here a little early. I
6 think that we can set it up on that. If it is not audible,
7 she said we can just put a microphone on it. We do have a
8 telephone number.

9 THE COURT: Okay. Well, I don't really think
10 it is reopening anything or re-examining anything. I have
11 the matter under advisement still from the hearing that we
12 had on September 22nd. I don't recall if Charlott was there
13 or not, but she is welcome to speak at this time.

14 MR. DUPONT: Thank you, Your Honor.

15 MS. CHARLOTT DEMOCKER: Good morning, Your
16 Honor. I am Charlott DeMocker.

17 THE COURT: Good morning.

18 MS. CHARLOTT DEMOCKER: It is difficult to
19 remember a time in my life when I have not felt protected,
20 sheltered from the countless dangers of growing up. In
21 16 years of living in the same small town, I never once
22 questioned the safety of my own home or where I sleep at
23 night.

24 While it is impossible to grasp the
25 number of changes the last year has forever meant to my life,

1 I can pinpoint almost instantly the cause of my constant
2 unease. For as long as I can remember, my father was there
3 to save me from the various perils of childhood. Every time
4 I scraped my knees climbing up to our treehouse or bruised my
5 elbow falling off our prized trampoline, my father was there
6 to lift me off the ground and hold me in his arms until I
7 felt invincible again.

8 I had an ideal childhood, but not because
9 of the dolls I played with or the things in my backyard.
10 With every year that I grew, my mother and father together
11 inspired a truly unparalleled love of the world and
12 everything it contained. With such a solid, gallant presence
13 in my life, I felt it was impossible for me to fail.

14 It is not unfair to say that my family
15 came upon hard times. With a long separation and an
16 impending divorce, there was noticeable strain on every
17 family member. But I will never forget the hundreds of hours
18 that I spent talking to my dad about how much he loved my
19 mother and how much he longed for a way to fix it all. That
20 is just who he is.

21 My father, my dad is the most
22 compassionate, supportive, brilliant man I know. I like to
23 think that because of my close relationship with him, I know
24 him better than most who could speak here today. And if
25 there is one thing I just know, it is that my father is not

1 capable of what he is accused of.

2 I was taught from a young age that all
3 life is sacred. So it is inconceivable that my dad, who
4 would not even kill spiders when I was young, but would
5 instead catch and release them, would be incapable of harming
6 not only another human being, but the woman he loved for
7 25 years. I am certain of my father's innocence and of his
8 nonviolent nature.

9 But for 390 days, he has been in jail,
10 punished constantly with no solid reason. It's not only his
11 current living conditions that are cruel, but it is also the
12 staggering loss that was suffered on July 2nd, 2008. His
13 arrest shortly afterwards has made it nearly impossible to
14 view the loss that has shaken my family to its very core.

15 The tragic loss of my mom was acutely
16 painful, but the added loss of my dad was and is unbearable.
17 For 13 months I have not touched or hugged my dad. Among
18 others things, he missed his daughters's birthdays, a
19 Christmas, and the first anniversary of my mother's untimely
20 death. If he is further delayed in coming home, he will be
21 absent for both my sister's graduation from college and my
22 own graduation from high school.

23 I need my father. And I ask today that
24 he be allowed to return home to soothe the deep pain of both
25 of his daughters.

1 THE COURT: Thank you.

2 Do you want to make arrangements with the
3 clerk?

4 MR. DUPONT: You are on speaker phone now.
5 Can you hear me all right?

6 MS. KATHERINE DEMOCKER: Yes.

7 THE COURT: Would you tell us your name,
8 first, of all, please.

9 MS. KATHERINE DEMOCKER: My name is Katherine
10 DeMocker.

11 THE COURT: Miss DeMocker, if you would please
12 speak in the tone that you have just been speaking in. You
13 are being reported by the court reporter, and she obviously
14 needs to be able to write down what you are saying.

15 But you are welcome to begin and let me
16 know your thoughts.

17 MS. KATHERINE DEMOCKER: All right. Is my
18 sister there? Has she already spoken?

19 THE COURT: She has already spoken.

20 MS. KATHERINE DEMOCKER: All right.

21 Well, first of all, thank you very much
22 for giving my sister the opportunity to voice our thoughts
23 and feelings on this issue. Let me apologize in advance.
24 I'm a little bit sick, so if you have trouble hearing me,
25 just stop me and let me know.

1 I am sure my sister has already
2 articulated our desire is to have our father be able to come
3 home and await trial and while still being able to kind of
4 serve as our father, a role that he does very well and has
5 been very missed in. There is no way for me to cover all the
6 reasons that I believe this should happen, which range from
7 personal to evidentiary or in my limited knowledge, lack
8 thereof. However, there are particular areas I would like to
9 touch on to give you a picture of who I believe my father is,
10 what he means to us, and why it is so important that he come
11 home, and also why we believe he could never do such a thing
12 as he is being accused of.

13 While it is a clear to me that my parents
14 grew apart over the years, which is not uncommon, they were
15 two of the best parents I could ever ask for growing up. We
16 are a ridiculously close family. We slept in the same bed or
17 at least in the same room for years when Charlott and I were
18 young.

19 They agreed on almost all parenting
20 decisions, including the fact that they both hated violence
21 so much that despite the fact that I was a stubborn terror of
22 a child sometimes, they didn't believe in spanking. I
23 remember the last time I ever got spanked it -- I was just
24 being so crazy in the back of a car. I was very, very
25 little, and I think my mom decided to spank me, and it

1 affected her and my dad so much that they decided from then
2 on I would only be given time outs. That is just one example
3 of ways that I -- I mean, I've never seen my parents really,
4 or my dad, be violent towards my family or my mom or anyone,
5 really.

6 During the years of their separation, it
7 was very clear that they were becoming slightly different
8 people, but it was also obvious that there were still parts
9 of them that loved each other very much and respected who the
10 other person was, which is probably why it took them over six
11 years of going back and forth on whether or not to get a
12 divorce before they finally did it. The divorce was, in the
13 end, I believe, probably the right decision. Charlott and I
14 were tired of hearing them go back and forth, and the divorce
15 was probably the best way to help them kind of both move on
16 with their lives and be happy again.

17 As I am sure you know and read, they
18 squabbled about money and little things like that, but in my
19 opinion and experience watching far nastier divorces of my
20 friends' parents, the things that they talked about were very
21 normal for kind of divorce -- people who were getting a
22 divorce. To my knowledge, there were never serious threats
23 of any kind or people feeling scared. It was more just kind
24 of frustration and anger over little things.

25 After the divorce was finalized, I saw

1 both of my parents kind of feeling relieved. They had a few
2 minor transactions to finish up, from what I recall, but I
3 don't know, things were being taken care of and planned
4 around, and everybody was kind of doing what needed to be
5 done to move on.

6 Not a month after the divorce, both of
7 them agreed to come to the airport with me to see me off to
8 where I was supposed to be studying abroad in South Africa.
9 The half-hour at the airport I spent saying good-bye to my
10 family is absolutely one of the most precious moments I hold
11 onto -- not only because it was the last time I saw my mom
12 alive, but because each of us there kind of expressed nothing
13 but love and appreciation for the family that the four of us
14 had created.

15 And the divorce didn't really destroy
16 this family that were all there together, even if the
17 dynamics had changed, and I think everyone there was really
18 just trying to express that. There were tears and smiles and
19 kind of embraces between everyone. And I obviously can't
20 convey, like, how I felt during that moment, but -- I mean,
21 as I walked down the airport terminal, I looked back and I
22 saw my dad with his arm around my mom and my sister, like all
23 waving good-bye to me. And that was, I think, maybe four
24 days before my mom was killed.

25 So to my knowledge, facts and evidence,

1 not emotions, convict people in court. But from what I have
2 been told, this case currently rests on motive and a lack of
3 an alibi. And to me, the emotion and the person that my dad
4 is is far more convincing evidence than that is at this
5 moment.

6 And my dad -- I mean, to give you some
7 idea of who he is to my sister and I, my dad became my best
8 friend in the last four years. He is the one I would call
9 while I was walking home from class if -- you know, if I was
10 upset with social dynamics at school, he would be the person
11 I would talk to. Boys, school -- he would wake up at 5:00
12 a.m. or earlier, sometimes to edit my paper that I had
13 finished the night before, just because he loved being our
14 dad. He liked being there and being part of our lives.

15 And I think that that is able -- he is
16 being very, very missing -- not just for me, but for somebody
17 probably even who needs him more, which is my little sister,
18 who is spending a lot of time now trying to prepare herself
19 to apply to college, which is one of the most stressful
20 things that I remember doing. And, you know, we have a great
21 support system, a large family who have all chipped in and
22 been very helpful -- and Rene, who has given up a lot of
23 things to help take care of my sister and be there. But I
24 don't think anyone can really replace a parent, especially in
25 such discombobulated circumstances that are currently taking

1 place.

2 So I think that that is really having an
3 effect. Every time I talk to Charlott, you know, there are
4 different areas of confusion and instability in her life that
5 I think there is just no replacement for an adequate parent.
6 And there is absolutely no doubt in my mind that my dad is
7 that parent. He has been for 22 years of my life, and I have
8 never once questioned him.

9 I guess -- I guess I don't -- I don't
10 know how to express exactly why it is I feel it's so
11 important for him to await this at home, because in the end,
12 I believe that, you know, he will come home to us. But I
13 think that even in this interim period between now and
14 whenever this trial fully takes place, I think it is
15 important for him to be there for my sister, for myself. And
16 because he has spent the last -- over a year in jail,
17 awaiting -- waiting for this thing to happen with, you
18 know -- I am not privy to all of the information, but
19 limited, limited evidence.

20 I don't believe he could ever do what he
21 is being accused of. I have never seen him be violent. You
22 know, the most he would ever do is yell at me when I was
23 being -- when I was being the very stubborn child that I
24 definitely had the tendency to do sometimes. He believed in
25 non-violence, would take us all on camping trips. He was a

1 vegetarian for the first ten, twelve years of my life with my
2 mom and sister and I. And, I don't know, he is a good
3 person. He is strong and would do pretty much anything for
4 his family, and I have never seen him question that.

5 So I really appreciate you taking the
6 time to hear us out on this, and if there is any way -- if
7 there is any way that this can have any effect, I would
8 really please ask that you let my dad come home on whatever
9 circumstances or conditions of release that you feel fit, but
10 it would mean a lot to us, and I am sure to him to be able to
11 spend the next few months waiting for this trial with his
12 family. We miss him very much.

13 THE COURT: Thank you.

14 MS. KATHERINE DEMOCKER: Thank you.

15 MR. DUPONT: And Your Honor, thank you very
16 much for allowing Katherine and Charlott to say a few words
17 about their father. I know that it's very --

18 THE COURT: Not at all. I think it's required
19 by the rules, as you correctly pointed out.

20 MR. DUPONT: It's required, and I think it's
21 just so important for you to know from the people who knew
22 him best what a good man he is, what a good father he was,
23 his life-long commitment to non-violence, and that he's a
24 person that really takes his responsibility to his family and
25 his daughters seriously. And we all believe that he takes

1 his responsibilities to the Court seriously, too. And he's
2 spent a lot of time and resources to make sure that this gets
3 done right.

4 You know, as I became familiar with this
5 case, and by happenstance I was here in town on unrelated
6 matters during the time of the arrest, and during the time
7 when you initially remanded this -- or invalidated the first
8 grand jury proceedings, I remember just having the sense of
9 wonder about the lack of evidence in this case and why the
10 State wasn't pursuing these other potential suspects and
11 like -- and I don't know all the facts -- the neighbor in the
12 yard -- or the neighbor who ended up killing himself.

13 That really turned to bewilderment when I
14 had a chance to meet and speak with Charlott and Katherine
15 and learn what a good man he is, what a good relationship he
16 had with them, and what a good relationship he had with his
17 wife that extended to when -- to after the divorce, too.
18 That this was still a functioning family unit after the
19 divorce, and they did have a good relationship.

20 My bewilderment turned to shock when I
21 learned about the initial appearance. And I think you have
22 seen that transcript now, where the prosecution and the judge
23 basically ruled that Charlott and Katherine would have to
24 waive their victims' rights to continue any relationship with
25 their father.

1 THE COURT: I thought that was a
2 misinterpretation of the law.

3 MR. DUPONT: I think so, too. And we have
4 made some progress in rectifying that at this point.

5 And I know that Miss Chapman is going to
6 be talking a little bit later about victim's rights -- a
7 little bit later today. I would like to take a minute to
8 voice our joinder in certain sections of that motion, while
9 we are here, if that's all right with you, Judge.

10 THE COURT: Miss DeMocker? She is gone.

11 Thank you. That was distracting. Go
12 ahead.

13 MR. DUPONT: Thank you, Your Honor.

14 Again, dealing with the shock, I think we
15 have all come to the understanding that loving your father
16 and wanting contact with him is not a violation of the
17 Victim's Rights Act. You don't need to waive your status as
18 a victim to continue a relationship with your father, and it
19 is certainly not a reason to cut Charlott and Katherine out
20 of the process.

21 And that is why we really want to join,
22 in particular, in Sections 1, 2 and 4 of Miss Chapman's
23 motion. We do believe there is a conflict that comes into
24 clear focus, particularly in this case when we do have the
25 initial ruling from the judge that they need to waive their

1 victim's rights in order to speak to their father.

2 So early on, they felt they had to waive
3 the right to be advised of hearings, to meet and confer with
4 the prosecutor, and to speak in court. But the problem
5 continues, because the victim's rights statutes say that even
6 if you take victim's rights and want the contact and the
7 judge approves it, that the prosecutor has some kind of right
8 by the Victim's Right Act to control the correspondence
9 between the defense attorneys and Charlott and Katherine.
10 They have a right to control the contact and even to
11 tape-record their conversations. That's wrong, Judge.

12 And we think that it's set out, all the
13 legal reasons that it's the wrong in Miss Chapman's motion.
14 So what's happened in this case is that they waived their
15 right to victim's rights, which limited their ability to get
16 information about the case. And then with the prosecutor by
17 statute being allowed to limit the contact with the defense
18 attorneys, that further limited their ability to get
19 information about the case. It just left them --

20 THE COURT: It didn't, because they waived.

21 MR. DUPONT: But the Victim's Rights Act say
22 that the prosecution is then still interjected between
23 the --

24 THE COURT: Whether it says that or not, that
25 is not a point in fact what has been happening, is it, to be

1 realistic?

2 MR. DUPONT: No, Judge, it's not. We have
3 been receiving some information, but the statute itself is
4 the problem. So that while we have taken some measure -- and
5 I've spoken with Mr. Butner recently. He's assured me that
6 they will be allowed to exercise their victim's rights and
7 confer and get information and voice their opinions in court
8 and to the prosecutor. That hasn't all happened yet, but we
9 think factually we are going to deal with some of the stuff.
10 But that doesn't correct the problem with the law itself.

11 And that's why we think it's still
12 important for us to join in those sections of the motion.
13 And in particular, one of the problems that still persists is
14 that their grandmother on their mother's side, who was a
15 person that was very close to them, that relationship has
16 become strained, and part of it has to do with the way the
17 victim's rights process has played out.

18 We think that if you rightly invalidate
19 those sections of the Victim's Right Act, the defense could
20 be a tremendous resource in providing that information to
21 their grandmother about the lack of evidence, about the
22 failure to pursue other suspects who may still be out there,
23 that they can be a real unifying force in this and help to
24 reunify the family.

25 So that is why, on behalf of Charlott and

1 Katherine, we are asking that you declare those sections
2 unconstitutional and that you release their father. You know
3 from everything you have heard that he is a good man and a
4 good father who takes his responsibility very seriously. He
5 will have his opportunity to prove his innocence.

6 From now until then, that is all time
7 lost. And that is important time for Katherine and for
8 Charlott. This bond between the father and a daughter is
9 sacred. It's been -- it's not right to interfere with that,
10 as the judge did at the initial appearance. And we are
11 asking that you set some conditions of bond that will allow
12 him to be out and to be reunited with his daughters.

13 THE COURT: Thank you. The matter remains
14 under advisement, as I took it under advisement previously.

15 Any particular order in which you want to
16 address the various motions between the two sides?

17 MR. BUTNER: Judge, before we move past that,
18 I did file -- it's sort of a response to what Mr. Dupont has
19 put before the Court, and I gave it to the clerk this
20 morning. And in essence, if I might just respond a little
21 bit orally at this point in time?

22 THE COURT: Is that different from what you
23 filed?

24 MR. BUTNER: Yes. Somewhat.

25 THE COURT: Go ahead.

1 MR. DUPONT: Your Honor, may I just interject?
2 And the reason is because -- and I got this response this
3 morning. But I understand that contact between any victims'
4 representatives at the prosecutor's office and Charlott and
5 Katherine is supposed to be privileged. I did notice that
6 Mr. Butner attached it to his pleading.

7 THE COURT: Is there a reference in what was
8 filed to that?

9 MR. DUPONT: It is an attachment, notes of the
10 conversations with the girls. So I just want either the
11 exhibit or the entire pleading sealed. And if Mr. Butner is
12 free to respond, but not in a way that would violate that
13 privilege between the victims' representatives and Charlott
14 and Katherine.

15 THE COURT: Mr. Butner.

16 MR. BUTNER: Judge, I don't know that that is
17 privileged if it has been opened by the victims and their
18 attorneys saying that they have been incorrectly advised by
19 the prosecution in this case. Seems to me that they have
20 said that, "Hey, the prosecutor is telling us the wrong thing
21 in this case or their victim services people are, and so we
22 haven't had our opportunity to be heard," and that is just
23 not the truth.

24 THE COURT: Well, in all honesty, the -- that
25 doesn't have any bearing on my decision on the release issue

1 as to whether they are or were misadvised or are misadvised.
2 I don't think they are misadvised now. So frankly, it's not
3 going to play an effect in my decision on the matter.

4 MR. BUTNER: Well, I am glad to hear that,
5 Judge, but I would like to set the record straight, and I did
6 do that by filing a copy of the e-mail transmissions that
7 took place early on in this case right after the defendant's
8 arrest.

9 THE COURT: Are the portions that you filed
10 the representations made or the information provided by your
11 side, meaning the Victim's Service Unit?

12 MR. BUTNER: Correct.

13 THE COURT: Or it is information provided by
14 the girls's to Victim's Service.

15 MR. BUTNER: Actually, it's both, Judge. It
16 is conversations directed by e-mail to the Victim's Services
17 Unit, and then it is responses from Victim Services to them
18 basically saying, quite frankly, that they certainly have the
19 right to be heard concerning release, and it has nothing to
20 do with their opting in or opting out with Victim Services.

21 THE COURT: It seems to me that the matters
22 provided by your staff to the victims are not privileged
23 material, in the sense of it being responsive to the claims
24 that were made. So I will redact any comments made by the
25 girls to Victim Services, and if you could submit a redacted

1 version of that, as far as what information was provided by
2 the County Attorney's Office, to make a complete record of
3 the advice given.

4 MR. BUTNER: I would just also like to note
5 that Katherine DeMocker, a few months ago, was being
6 represented by Mr. Kottke.

7 THE COURT: I noted that, and I noticed that
8 Mr. Kottke -- or Mr. Dupont had not substituted for, but as
9 we know, people can have multiple attorneys.

10 MR. BUTNER: And at that time, I had asked
11 Mr. Kottke to set up a meeting so that I could speak with
12 Katherine DeMocker about this case, and he basically declined
13 to do so. I have not heard from anybody in regard to
14 Charlott DeMocker, until Mr. Dupont became involved, and he
15 indicated that he would like to set up such a meeting. And,
16 of course, I told him that I would be happy to meet with both
17 the victims and that I tried to do so before, in fact.

18 Quite frankly, Judge, it's not accurate
19 what is being presented to the Court. And also, I would like
20 to point out that it may be that the relationship with Ruth
21 Kennedy, the grandmother of the girls, is strained. She is
22 the mother of the victim in this case. I have had
23 conversations with her, and I have had conversations with the
24 brother of the victim, John Kennedy, and concerning the kind
25 of evidence that is present in this case, et cetera. And

1 Ruth Kennedy has also informed me that she has been present
2 at meetings -- or at least a meeting with Mr. Sears and
3 discussed the case.

4 So they have certainly been advised about
5 the kind of evidence that is present in this case. I would
6 suggest that the strained relationship in this case is not a
7 function of victim's rights or the Victim's Rights Statute or
8 any of those kind of things, but rather, it's a function of
9 the facts in this case.

10 THE COURT: Thank you.

11 MR. BUTNER: Thank you.

12 THE COURT: Mr. Dupont, anything else?

13 MR. DUPONT: No, Your Honor.

14 I do have the citation to give
15 confidentiality. It's 13-4430. And that's just to complete
16 the record. Thank you.

17 THE COURT: Well, to the extent that it has
18 been raised, I think, as I say, that the State's portion of
19 the information with regard to what was -- what they advised
20 the girls of their victim's rights is something that
21 Mr. Butner can submit to complete the record on the issue.

22 As I also say, I don't think it has any
23 bearing on my receipt of the girls' statements, however, at
24 this point. And since the matter is still under advisement,
25 I think it is timely.

1 MR. DUPONT: I think so, too, Judge. And, you
2 know, I don't necessarily want to get into the effect of what
3 the victims' representative has to say and how they weighed
4 that versus the prosecutor and the judge saying something
5 different, but it seems to be on the right track again, and
6 we thank you for putting it there and for hearing us today.

7 THE COURT: I'm happy to have it there. Thank
8 you.

9 And to the extent you want to be excused
10 and not sit through all of the rest of the motions, you are
11 excused, and thank you for being here this morning.

12 MR. DUPONT: Thank you, Judge.

13 THE COURT: All right. Back to my question of
14 any particular order in which you want to take the issues, if
15 you want to take the Victim's Rights Statutes and Rule motion
16 up first, since we are somewhat on that topic already, I can
17 do that. But any preferences?

18 MR. SEARS: Judge, actually, the order of the
19 motions in my e-mail to Martha was the game plan that we had
20 in mind that put the victim rights motion later in the day.

21 THE COURT: Sure.

22 MR. SEARS: But if I could be heard briefly on
23 what we just talked about. There is an aspect of that I
24 think the Court needs to know about in terms of how
25 Mr. Dupont became involved. He's unfamiliar with that -- if

1 I could just speak briefly to that.

2 THE COURT: You may.

3 MR. SEARS: Thank you.

4 Judge, Mr. Kottke, as the Court knows,
5 represented Katie DeMocker in her capacity as personal
6 representative of her mother's estate. Mr. Kottke is a trust
7 and estate lawyer.

8 And when the topic of representing Katie
9 in a matter beyond that, that involved her position as a
10 victim in this case under the statute, Mr. Kottke made it
11 clear to me that he was no more comfortable venturing into
12 the field of criminal law than I would have been in probate
13 and estate work.

14 And Mr. Butner may not remember this, but
15 I communicated to him, I'm reasonably sure in writing,
16 probably by e-mail, that the girls were looking to retain
17 private counsel, and it would take them some time do that,
18 but that he would eventually hear from private counsel, which
19 is, in fact, what happened when Mr. Dupont was retained by
20 the girls to represent them in this context.

21 And Mr. Kottke, to the extent he
22 declined -- he was declined because it was, A, something he
23 didn't do and, B, something we were going to try to help the
24 girls address in a different way, and that is what has come
25 to pass in this case.

1 But I also share Mr. Dupont's and
2 Mr. Butner's view that it's certainly more than appropriate
3 for Katie and Charlott to be given all the rights that crime
4 victims are given under the law in this state, to the extent
5 those laws are constitutional.

6 But having said that, Judge, we had a
7 couple of things we wanted to take up preliminarily about
8 scheduling so that we have an understanding of where you want
9 to go here. In addition to moving through these motions in
10 the order that we suggested, we came away from the in-camera
11 discussion -- in chambers discussion with the Court at the
12 end of last week with the idea that perhaps sometime before
13 Thursday you might want to have another session with the
14 lawyers to talk a bit more about the probable cause and the
15 Chronis issues. And we are certainly more than willing and
16 very much interested in doing that if you wanted to do that.

17 But to the extent that you now have bench
18 memorandum from both sides, you know, my thought on that
19 would be that the scheduling of our witness is for Thursday
20 morning, and we thought that perhaps if you were going to
21 entertain argument after that, the actual argument on that
22 motion could be done, logically, at the end of the evidence.

23 We don't know if the State has any
24 rebuttal evidence that they would put on, but that is kind of
25 what they are looking. But if the Court has time and any

1 inclination to talk with us some more about these issues, we
2 would be very much in favor of that.

3 THE COURT: All right. And that was roughly
4 what I was thinking, also, is the Chronis portion of the
5 hearing would be on Thursday.

6 If you want to talk about it before then,
7 if we get through the other motion before then, I am open to
8 that.

9 MR. SEARS: I forgot to make a copy of my own
10 e-mail here. So I can't remember what --

11 THE COURT: The next one after the allocution
12 with regard to release was the motion to strike the death
13 penalty notice.

14 MR. SEARS: I think Miss Chapman is ready to
15 be heard on that, if the Court is ready, Your Honor.

16 THE COURT: I am. In reference to what that
17 was all about, there was an October 8 defense motion to
18 strike the death penalty notice. The State responded on
19 October 15, and defense replied on October 20th. So I guess
20 it's timely.

21 Is that all right with you in going to
22 that next?

23 MR. BUTNER: Judge, haven't you already ruled
24 on this?

25 THE COURT: Not the motion to strike the death

1 penalty notice, no.

2 MR. BUTNER: Okay.

3 THE COURT: No. There was a motion to direct
4 election of F-6 aggravators that I thought I had ruled on,
5 but maybe somebody is not too clear on that. That is the
6 next topic after the motion to strike.

7 Miss Chapman.

8 MS. CHAPMAN: So, Your Honor, just to address,
9 this is the 15.1 motion on the failure to timely file the
10 death notice.

11 THE COURT: That is what I understood it to
12 be, too.

13 MS. CHAPMAN: Good. We're all on the same
14 page.

15 Just to briefly go through the time line
16 with you, Your Honor, which was laid out in the motion, the
17 initial notice was filed on October 27, and they -- there
18 were three factors alleged -- F-2, F-5, and F-13, at that
19 time.

20 The Amended Notice of Intent added F-12
21 on November 21st of 2008, and Your Honor remanded the case
22 back to the grand jury on January 22nd of '09.

23 A new indictment was issued by the second
24 grand jury in February of '09. And despite defense counsels'
25 requests, those aggravators were not submitted to the grand

1 jury, so no probable cause finding was found on those at that
2 time, and no aggravators were in that indictment.

3 Mr. DeMocker was re-arraigned, then, on
4 February 10 of 2009. And then on May 13 of 2009, the State
5 again filed a notice again alleging 2, 5, 13 and 12. That
6 was 90 days after the arraignment, and so 31 days after the
7 time provided for under 15.1.

8 And then in June -- June 29 of '09, which
9 was now 120 days after the arraignment, 77 days after the
10 time permitted by the rule, the State amended to allege F-6.

11 So that is the time frame for all of the
12 indictments and the notices provided by the State.

13 And as we pointed out in our motion, Your
14 Honor, the Rule 15.1(I) is a mandatory time frame. It was
15 amended by the Supreme Court after reading in 2002, and it
16 affects the Sixth Amendment jury trial right. Whether or not
17 it's a factor or a quasi factor, it affects your Sixth
18 Amendment jury trial right.

19 And it affects every decision that the
20 defense makes, because it affects what kind of resources are
21 required. It affects the Eighth Amendment right, because it
22 affects what kind of decision you are looking at. So every
23 decision in a capital case is affected by whether or not you
24 are talking about a capital case or whether or not you are
25 talking about a non-capital charge, which is what the

1 aggravators do.

2 There are specific conditions in 15.1 for
3 giving an extension of time. The State can do that by
4 stipulation or by asking the Court for an additional period
5 of time. They did not do that. No stipulation was reached.
6 They didn't ask the Court for more time. They didn't ask us
7 for more time. The Court didn't grant any extension of time
8 The State simply ignored the rules under 15.1.

9 You, under 15.7, have discretion to grant
10 any sanction that you think is appropriate, and there is no
11 abuse of discretion unless no reasonable judge would have
12 reached the same result under similar circumstances, and that
13 is found in State v. Armstrong.

14 One of the factors that you consider when
15 considering a sanction under 15.7 is the significance of the
16 information. And I think when you look at the significance
17 of the death notice, when you look at what is affected by the
18 death notice, what the death notice really does is transform
19 a charge of first degree murder into a charge of capital
20 murder. And again, that affects a defendant's Sixth
21 Amendment right. It affects a defendant's Eighth Amendment
22 right. It affects a defendant's Fourteenth Amendment right.
23 It affects what kind of resources are going to be involved in
24 case. It affects every decision a lawyer makes in trying and
25 resourcing, investigating a case. It is the most significant

1 piece of information a defendant experiences in a criminal
2 defense case.

3 And so I think extraordinary measures are
4 required as a whole death is a different line of
5 jurisprudence, which is included in the motion. I think
6 there is no more significant peace of information when you
7 are considering what kind of sanction should be imposed. I
8 would ask you to consider that heavily under the 15.7
9 analysis.

10 I would also ask you to consider that the
11 State has refused to comply with other parts of Rule 15, in
12 that they haven't identified any documents that they intend
13 to rely on with respect to specific mitigators, which they
14 are required to list under the rules. So while they might --
15 and in their response they responded by saying, well, there
16 is no prejudice to you, defendant, because you know what the
17 aggravators are, and you had time to prepare for trial.

18 Well, given their continued failure to
19 comply with this rule and many other rules by saying we need
20 more time to analyze these aggravators, and given their
21 failure to list specific documents that they intend to rely
22 on, which is also required under the rule, we are not in a
23 position to prepare what the rules contemplate that we are
24 going to be under, because of their continued failure to
25 comply with these rules.

1 And Your Honor, as I pointed out in the
2 reply, their continued failure to abide by this rule and
3 other rules under 15.7 is also a violation of the separation
4 of powers. Because if the prosecution in the State is only
5 required to comply with the rules that are set under the law
6 and under the constitution by the Supreme Court, then the
7 prosecution is, in effect, controlling what process is
8 required. And that under the constitution is provided for by
9 the Supreme Court, and that is what defendants are entitled
10 to in criminal cases. And the prosecution in this case has
11 continued to ignore those rules and treat them as if they are
12 only suggestions that should be followed when it's convenient
13 for them.

14 The other thing that you consider under
15 15.7, Your Honor, is what is the effect on the prosecution
16 and the victim in the event that you impose the sanction.
17 And Your Honor, if you dismiss the death notice, the effect
18 is a sentencing option is limited. That is the effect.

19 There are other sentencing options for
20 the State, and I cited Your Honor to the Barrs case, which
21 held that continuance is not the only proper remedy, and that
22 you need not consider less stringent sentencing sanctions
23 when the only loss is a sentencing option. So under 15.7 you
24 have the authority to do it, and under 15.1(I) it is
25 mandatory.

1 They didn't provide any reason for not
2 doing it, not complying with the rule, other than -- I
3 honestly don't know what their reasoning is, other than they
4 didn't think of it with respect to F-6, and other than that
5 they didn't think they needed to follow the rule because you
6 had remanded it. And frankly, that is no reason at all, and
7 we'd ask you to dismiss the notice.

8 THE COURT: Thank you.

9 Mr. Butner.

10 MR. BUTNER: Judge, the rule requires that the
11 notice be filed in a timely fashion that the State is seeking
12 the death penalty, and that was done. This has been a
13 capital case, basically, from the get-go. There has been a
14 remand motion, and there were modifications in the
15 aggravators that were filed by the State, but those
16 modifications, the last of which was back in June of this
17 year, that is still 11 months before the presumed trial date
18 in this case.

19 I have heard not one single word to
20 suggest that there has been any prejudice to the defense in
21 this case. And we've cited the cases of Holmberg vs. de Leon
22 and State vs. Cropper to the Court to basically demonstrate
23 that that is the requirement here, that there is prejudice to
24 the defense in this case, and they don't have any. There
25 hasn't been any prejudice.

1 In fact, they have had voluminous
2 disclosure in this case. That has been the real problem in
3 the case, that there is a tremendous amount of disclosure.
4 And the State has been, quite frankly, scrambling to get all
5 of that information to the defense, but we've managed to do
6 that.

7 They clearly have ample time to prepare
8 for a defense, they clearly have had adequate notice. This
9 is a notice-pleading state, of course. These kinds of
10 notices are what are required by the rules, and the State has
11 complied with the rules in that regard, and we have done it
12 as quickly as possible.

13 So to ask that the death penalty be
14 stricken on the basis that the State hasn't timely complied
15 with the rule is disingenuous to suggest that. The State did
16 timely comply with the rule of noticing the death penalty.
17 The problem has been in terms of amendments thereafter, but
18 we have a remand that took place in this case, we have change
19 in prosecutors, we have voluminous disclosure. The State has
20 done its best to keep abreast of all of these things, making
21 minor amendments along the way, but never changing the fact
22 that the State was seeking the death penalty and that this
23 was a capital case right from the beginning.

24 So I would ask that -- and by the way,
25 there is nothing to require the Court to impose some kind of

1 sanctions upon the State, particularly when you can see that
2 good faith has been demonstrated by the State in this case.
3 So I would ask that the Court deny the defense motion to
4 strike the death penalty. Thank you.

5 THE COURT: Ms. Chapman.

6 MS. CHAPMAN: Your Honor, I guess the only
7 response is I don't know if we are reading the same rule, but
8 15.1(I) doesn't say anything about a reasonable disclosure.
9 It says 60 days after the arraignment. There is nothing
10 unclear about it.

11 And, you know, I don't think it's
12 disingenuous to ask the State to comply by the rules that the
13 Supreme Court provides for disclosure. It is not
14 discretionary. It is mandatory. That is what they are
15 required to do. They didn't do it.

16 THE COURT: The first one was within 60 days
17 of the first indictment.

18 MS. CHAPMAN: That's correct.

19 THE COURT: Is there anything in Rule 15.1(I)
20 that restricts the prosecution from filing the death penalty
21 notice before the indictment -- or before the arraignment?
22 Excuse me.

23 MS. CHAPMAN: It says it shall be 60 days
24 after the arraignment, no later than 60 days.

25 THE COURT: No, it says no later than 60 days.

1 MS. CHAPMAN: No later than 60 days after the
2 arraignment in Superior Court.

3 THE COURT: It doesn't say it can't be filed
4 before the arraignment.

5 MS. CHAPMAN: Right. But he was arraigned on
6 the first indictment -- he wasn't arraigned, excuse me, on
7 the second indictment until February 10. So the question is
8 once you remanded him on January 22nd, '09, was he indicted
9 where there was no indictment in effect once he was remanded.

10 THE COURT: Is there a requirement that -- is
11 there some case law on a re-indicted case that strikes the
12 death penalty notice that has already been given in the same
13 case?

14 MS. CHAPMAN: You mean a case where someone
15 has been remanded?

16 THE COURT: Yeah. The case that we have here.
17 Is there anything similar in the case law that says that the
18 notice that is provided in a timely fashion before the remand
19 occurs is somehow wiped off the books by the remand?

20 MS. CHAPMAN: Well, I don't know, except you
21 could analogize that if they hadn't re-indicted him -- I
22 mean, there would be no charge against him. It doesn't stay
23 in effect once the case has been remanded. I am happy to
24 supplement briefing for you on that question.

25 But I also think that even if that is

1 true, the F-6 amendment would be untimely under any analysis,
2 even if --

3 THE COURT: Is there a proscription against an
4 amendment to a death penalty notice with regard to particular
5 aggravating circumstances?

6 MS. CHAPMAN: Well, the prosecutor has to
7 provide the list of aggravating circumstances concurrently.
8 That is (I)(2).

9 THE COURT: Right.

10 MS. CHAPMAN: So the list has to be provided
11 concurrently with a notice.

12 THE COURT: Is there any proscription against
13 amending the notice?

14 MS. CHAPMAN: Well, you would, again, have to
15 go through the process of requesting an additional extension.
16 I mean, to the extent you could get an extension to file the
17 notice and so the list of aggravators, you would have to go
18 through the same process, that is, asking the Court --

19 THE COURT: Where is that provided in the
20 rule?

21 MS. CHAPMAN: "This period may be extended for
22 30 days." It's the (I)(1) provision about extension.

23 THE COURT: There isn't anything in 15.1(I)
24 that provides -- that says an amendment is not allowed, is
25 there?

1 MS. CHAPMAN: I'm sorry?

2 THE COURT: Is there any particular language
3 in 15.1(I) that --

4 MS. CHAPMAN: About an amendment?

5 THE COURT: -- That disallows an amendment of
6 aggravating factors?

7 MS. CHAPMAN: No. What it allows is that
8 whatever specific aggravators were going to be alleged have
9 to be listed at the same time that you give your notice of
10 intent. That is what (I)(2) says. "When you file your
11 notice of intent, the prosecutor shall at the same time
12 provide the defendant with the list of aggravating
13 circumstances."

14 THE COURT: Let me bounce back to Mr. Butner,
15 because I may want to have him respond to that.

16 Mr. Butner, what is there, conversely, in
17 Rule 15.1(I) that would allow an amendment of the death
18 penalty notice to add the particular factor that was added or
19 alleged June 29?

20 MR. BUTNER: Judge, I think that the focus of
21 the rule, quite frankly, is to, first of all, provide notice
22 that the State is seeking the death penalty. That's what was
23 done. And at that time, it says, "a list of aggravating
24 circumstances the State will rely upon at the aggravation
25 hearing in seeking the death penalty."

1 Now, that aggravation hearing presumably
2 takes place after the jury has convicted the defendant. So
3 it's a notice type of requirement. There is nothing in there
4 to indicate anything at all about whether amendments are
5 prescribed or proscribed. Doesn't say anything about that.

6 But it seems to me, a common sense
7 reading of these kinds of rules and recognizing that Arizona
8 is a notice-pleading state, and that this whole rule is
9 directed at notice to the defense, that, first of all, the
10 State has given timely notice that we are seeking the death
11 penalty.

12 Secondly, when it becomes apparent to the
13 prosecutor after a list of aggravating circumstances have
14 been filed at the same time as that death penalty notice that
15 there are additional factors that would be present,
16 additional evidence that would give rise to other aggravating
17 factors, that you should notice those factors as quickly as
18 they become apparent to the prosecutor. That is exactly what
19 was done in this case.

20 THE COURT: Why wasn't that notice with regard
21 to F-6 -- I think it was -- why wasn't that provided in the
22 first notice?

23 MR. BUTNER: I suspect because I wasn't the
24 prosecutor, would be the main reason. I really don't know,
25 because I wasn't involved with this case at that time.

1 It became apparent to me that the facts
2 would give rise to that after finding out the manner --
3 understanding the true manner in which the victim was killed
4 in this case. And of course, we have already heard evidence
5 about that.

6 And so as soon as I became sufficiently
7 familiar with the case to provide such a notice, I did that.

8 THE COURT: I understand there was a change
9 over of particular counsel, but the State is the State.

10 MR. BUTNER: I agree, Judge. And of course, I
11 am carrying the work that was done before me, and I am proud
12 of that, and I am also carrying, maybe, some omissions that
13 weren't there or -- basically, not so much omissions, but the
14 fact that I am a different prosecutor, and I recognize that
15 there was evidence in this case that certainly gave rise to
16 an F-6 aggravator.

17 There is nothing in this rule to preclude
18 the State amending and filing such an aggravator, and we
19 certainly did that in a timely fashion -- in fact, almost as
20 quickly as I came on board, so as not to prejudice the
21 defense at the time of trial in this case, in order to give
22 them ample notice to defend.

23 THE COURT: Please, back to you.

24 MS. CHAPMAN: Sure. Your Honor, if I might --
25 if you look -- the legislature, when they want to provide for

1 amendment of time to specific provisions within 15.1, they
2 do. And they did with respect to the notice that the
3 prosecutor is required to give under 15.1(I)(3), which is
4 directed to the disclosure of names and addresses and lists
5 of papers and documents.

6 If you look at 15.(I)(4), it says that
7 the Court may "enlarge the time under 15.(I)(3) to be amended
8 upon a showing of good cause by the prosecution or upon
9 stipulation." That is limited to (3). It does not include
10 the provision under (I)(1) or (I)(2) that we are dealing with
11 here. So it seems, by exclusion, the legislature did not
12 require an amendment or the Court to --

13 THE COURT: The Supreme Court, you mean?

14 MS. CHAPMAN: Right. Excuse me. The Supreme
15 Court didn't require amendment for good cause or any other
16 reason of the notice, and it does give a specific time frame
17 of 60 days, and it does require the circumstances to be
18 provided at the same time -- under (1) and (2).

19 THE COURT: Thank you.

20 Anything else that you wanted to say
21 about that?

22 MS. CHAPMAN: No, Your Honor.

23 THE COURT: I think that the Supreme Court
24 rules -- and they are the ones that pass the rules of
25 criminal procedure and Rule 15.1, specifically -- provide

1 for the additional disclosure in a capital case under
2 Subsection (I), and that requires the prosecution no later
3 than 60 days after arraignment in Superior Court to provide
4 defendant notice of whether or not the death penalty is being
5 sought.

6 And I don't disagree with counsel for the
7 State that Arizona is a notice-pleading state. And the
8 purpose of providing for that relatively early decision and
9 early requirement is to allow the additional qualitative
10 differences in a death penalty case and put the defense on
11 early notice with regard to that -- and provide that same
12 notice to the Superior Court, which also is required to do
13 different things in the circumstances of a death penalty case
14 than it is in a case in which the death penalty is not at
15 issue. It is a murder case with other penalties.

16 The rule itself doesn't speak to the
17 issue of how early the death penalty can be noticed. It
18 doesn't restrict the State from filing the notice after the
19 complaint is filed and before an arraignment takes place, and
20 so I would find that the State's notice of the death penalty
21 in this case was timely. It took place no later than 60 days
22 after the arraignment in Superior Court, in particular with
23 regard to the putting the defense on notice that the death
24 penalty was being sought.

25 So I don't believe that simply based on

1 the timing of the remand, the second grand jury, the fact
2 that the State did not formalize a re-allegation of the
3 various factors for which they were seeking the death penalty
4 on May 13, 2009, is something that is sanctionable.

5 The -- acknowledging the provisions of
6 Subsection (I)(4), I am also not going to strike the
7 allegations, at this point, with regard to the F-6 amended
8 allegation that the State didn't make until June 29, 2009,
9 again finding that no prejudice has been shown with regard to
10 that issue.

11 We are still dealing with, of course, the
12 Chronis hearing. Chronis came out roughly the same time as
13 the State filed its F-6 amendment, and so we are still
14 dealing with whether or not there is probable cause to
15 support that particular subsection. We will get to that in
16 the Chronis hearing.

17 But the motion to strike is denied.

18 The election of F-6 aggravators is the
19 next one that I had on the list. I think my bailiff has
20 provided each of you a copy.

21 The Court notes that --

22 MS. CHAPMAN: Your Honor --

23 THE COURT: Excuse me just a second -- that we
24 have had supplementation in terms of the bench memorandum
25 with regard to the Chronis issues. So that has been flushed

1 out to some extent, even beyond the motion itself.

2 Yes, Miss Chapman.

3 MS. CHAPMAN: I just wanted to go back for one
4 second and make sure I didn't misspeak and that the record is
5 clear.

6 This 15.1(I)(4), which provides for an
7 enlargement of time, does not apply to an enlargement of time
8 to amend a list of aggravators.

9 THE COURT: I recognize what you said.

10 MS. CHAPMAN: Okay. I just wanted to make
11 sure. Thank you.

12 THE COURT: Thank you. No problem with
13 clarifying the record at any time. Please do so.

14 Mr. Sears, are you addressing the next
15 one?

16 MR. SEARS: I am.

17 THE COURT: Go ahead. I am going to take this
18 issue, and then we will take a break for the morning.

19 MR. SEARS: Thank you. I appreciate that,
20 Your Honor.

21 Your Honor, in our motion we asked the
22 Court to order the State to elect which of the three prongs
23 in F-6 they intended to proceed on, if this matter went to a
24 penalty phase. And we provided you with some authority for
25 that requirement, principally to avoid the possibility that a

1 penalty jury could render confusing, contradictory, and
2 perhaps inconsistent verdicts and non-unanimous verdicts if
3 the State was not electing which ones to proceed on.

4 And in there from a number of sources,
5 beginning with both of the grand jury presentations, the
6 evidence that they offered at the multi-day Simpson hearing,
7 earlier this year and late last year, and particularly the
8 evidence that has been adduced in the five days of the
9 Chronis hearing and provided to the Court, as you just noted,
10 in the bench memorandum that the State has submitted, our
11 assessment is that the State has essentially abandoned the
12 heinous prong. They have not offered, that we can see, any
13 evidence that Arizona case law would describe or define as
14 supporting a finding that under F-6 this was an especially
15 heinous murder.

16 Instead, what we understand the State to
17 be doing is to be proceeding, if at all, on the cruel and
18 depraved prongs of F-6. And I have not heard from the State
19 whether that is their position today. If it is, I think that
20 is all that needs to be said on this.

21 If they have a different view and want to
22 proceed on a heinous prong, then I think we need to step back
23 for a moment and examine what the evidence is at this point.
24 And that may be beyond the scope of this motion, which was
25 simply to direct them to elect, and may be both the subject

1 of your ruling on the Chronis issues when we get to that, but
2 in addition, also something that could be dealt with by a
3 subsequent motion that could perhaps be heard in January of
4 next year, if the State intends to proceed and somehow is
5 able to establish to your satisfaction that they have
6 probable cause on the heinous prong on F-6.

7 THE COURT: I guess one of the confusing
8 aspects for me of the subtleness of the Supreme Court
9 language with regard to heinous or depraved is sometimes the
10 Supreme Court doesn't seem particularly clear about the
11 gratuitous violence, whether they are plugging it in under
12 "depraved" or whether they're plugging it in under "heinous."
13 I understand that that's the allegation that the State is
14 making with regard to that aspect of F-6.

15 Do you have any observations or comments
16 with regard to that?

17 MR. SEARS: I share the Court's general
18 assessment that Arizona and the United States Supreme Court
19 jurisprudence on these points is difficult to work through.
20 But we think at the end, that there is a pretty clear
21 distinction in the case law, certainly between cruelty and
22 depravity, particularly as to the facts of this case have
23 developed. And we think that logically and
24 jurisprudentially, "heinous" means something else. It is not
25 a subset of depravity or cruelty. It has its own particular

1 meaning.

2 And we provided the Court with what I
3 think is the baseline Arizona case law on that point. And we
4 will talk about this in the context of other motions
5 throughout the course of the day today.

6 But the way we see the evidence presented
7 by the State at this point is that they have a theory of the
8 cruelty prong under F-6 that based on the conscious
9 infliction of pain and fear and defensive wounds.

10 And then they have an argument that seems
11 to be in the alternative, that to the extent that the
12 evidence wouldn't support a finding of cruelty because of
13 what we think is evidence, that the victim was unconscious
14 almost immediately, then this was a case of overkill. And we
15 noted your comments in chambers, Your Honor, about this, in
16 which you said, essentially, that you get the distinction and
17 you see that the argument about depravity is related, at
18 least in part, to the number of blows that Dr. Keen has
19 identified.

20 And so we see those, in one sense, as
21 being mirror opposites -- that cruelty requires consciousness
22 and fear and actual sensation of pain.

23 The depravity argument would cover the
24 situation that if the Court didn't find that from the
25 evidence that there was so many blows, that it was beyond the

1 force necessary to kill and was some sort of overkill, and
2 that under the case law that could be treated as evidence of
3 depravity on the part of the assailant in this case.

4 Stuck in the middle someplace is the
5 prong dealing with heinousness, which I know the Court can
6 think of a number of synonyms from the case law, because that
7 is what we sometimes have to resort to is that when you are
8 talking about heinousness in the context of F-6 and
9 aggravation in a capital case, it calls to mind cases
10 involving mutilation of a corpse. And I would agree that
11 "relishing" and some of those other concepts that they talk
12 about in Gretzer and Murdaugh tend to also implicate cruelty.

13 But the distinction I think that we have
14 to keep in mind is that in those cases -- Gretzer, for
15 example -- they were proceeding on all of the prongs of F-6,
16 as I understand the facts in that case. So the same conduct
17 could form the basis for a finding of heinousness and a
18 finding of depravity.

19 But we think the State has positioned
20 itself, with regard to the evidence that is presented thus
21 far in five days of hearing, to be either/or -- either cruel
22 or depraved and not, in addition, somehow, a heinous event.

23 "Heinous" does not have, in the
24 jurisprudence that we know about in this case, a meaning that
25 is dependent on being also cruel or depraved. It has a

1 separate, independent meaning, and we just have not yet seen
2 any evidence from the State that we can connect in our own
3 mind to the aggravator, so that is why we filed this motion.

4 And if we don't draw some lines here, and
5 the State were allowed to proceed with all of it but present
6 evidence as to only cruel and depraved as the prongs, then
7 the jury would be misinstructed. They would be given
8 instruction on heinousness, which wouldn't apply to the facts
9 in the case and wouldn't be something that the State would be
10 pursuing.

11 On the other hand, if the State does
12 think that it has evidence and does intend to pursue, then
13 that will affect the remainder of the Chronis hearing and the
14 arguments that we would make to you at the close of evidence
15 in the Chronis hearing, about whether they have presented any
16 evidence of the heinous prong and, if the Court finds that
17 they do, whether that evidence would ever rise to the level
18 of probable cause in this case.

19 This was an early motion that we filed.
20 We filed it before the Chronis motion, and we did it for that
21 reason. So we are trying to -- in the context of a narrowing
22 process, which is all that the aggravators are, we are trying
23 to narrow the narrowing of it and get the Court and the State
24 to let us know where this is headed.

25 THE COURT: Thank you.

1 Mr. Butner.

2 MR. BUTNER: First of all, I agree with Court
3 and Counsel concerning heinousness. It is kind of confusing
4 in the case law in terms of where heinousness begins and
5 depravity ends or vice versa. But to clarify the
6 circumstances, the State believes that there is evidence and
7 that we have already, in fact, presented evidence that of
8 course this was a cruel offense, and also it was a depraved
9 offense. And to that extent we have elected, so to speak,
10 those prongs of that F-6 aggravator.

11 We are not seeking -- and I will clarify
12 it on the record at this point, I thought I had mentioned
13 this to Mr. Sears -- but we are not seeking to prove that
14 this was a heinous offense. I don't think -- it just doesn't
15 fit to the extent that I understand the case law. We don't
16 have that kind of evidence.

17 We have cruelty, because there is
18 evidence that the victim for a while was conscious and
19 experienced pain, mental suffering, so to speak, also, and
20 that there were severe injuries inflicted upon her while she
21 was conscious and suffered a great deal as a result of that.
22 We then move past that, and I believe we presented
23 substantial evidence in this case that there was gratuitous
24 violence, that she was -- her skull was shattered and
25 destroyed and mutilated.

1 THE COURT: You think -- you agree with
2 Mr. Sears that that seems now to come under the terminology
3 of "depravity" --

4 MR. BUTNER: I do.

5 THE COURT: -- as distinguished from
6 "heinous."

7 MR. BUTNER: I can't recall which case it was,
8 but the Court used "heinous" and "depraved" --

9 THE COURT: Gretzer.

10 MR. BUTNER: -- talking about the same thing.
11 But refinement of those kinds of things and reading other
12 cases, it appears that really that kind of situation -- and
13 that's what I believe we have here -- is a situation that
14 evidence is depravity, not heinousness.

15 MS. CHAPMAN: That was Gretzer, and that was
16 six years ago.

17 MR. BUTNER: Right. A long time ago.

18 Yeah, in fact, we quoted it to the
19 Court -- I am just looking at it -- where the -- and also
20 Reinhardt, where the factors used to establish a heinous and
21 depraved state of mind are "relishing the killing." I think
22 that goes to heinousness.

23 "Commission of gratuitous violence." I
24 think that goes to depravity.

25 "Mutilation of the victim." I think that

1 goes to depravity.

2 "Helplessness of the victim." I think
3 that goes to depravity.

4 So we have all of those things present
5 with substantial evidence in this case.

6 Of course, we also cite to the Court a
7 case that I am fairly familiar with, and that is Bocharski,
8 "Gratuitous violence occurs when the defendant uses violence
9 in addition to that necessary to kill and intends to inflict
10 such violence," and I think there is substantial evidence of
11 that in this case.

12 So I believe we have adequately
13 responded.

14 THE COURT: I am not unfamiliar with Bocharski
15 and --

16 MR. BUTNER: I know you are not either.

17 THE COURT: The end result of Bocharski was a
18 finding that the death penalty was not appropriate.

19 MR. BUTNER: Extremely disturbing, I thought.

20 THE COURT: I will not comment on that.

21 MR. SEARS: Would you like my opinion on that,
22 Your Honor?

23 THE COURT: At your leisure, during the break.

24 I find the State has made its election
25 that it is alternatively cruelty or depravity, as they have

1 listed in their Chronis memorandum. So I think they have
2 elected -- I think the motion is therefore covered and moot.

3 But I respect, Mr. Sears, your wanting to
4 keep it clear, and I think it is now clear. Whether it has
5 support in the evidence on the Chronis hearing, we will still
6 address that later.

7 Let's take a recess of about 15 minutes.
8 We will resume according to the court clock at 25 minutes to
9 11:00.

10 (Brief recess.)

11 THE COURT: Record reflects the defendant is
12 present with all his respective counsel and Mr. Butner.

13 The next on my list, and I expect yours,
14 is the motion to set schedule for witness interviews. There
15 was a motion pertaining to that filed by the defense on
16 October 7, and the State filed a response on October 13.

17 Are we making any progress toward that,
18 Mr. Sears?

19 MR. SEARS: Judge, let me tell you our
20 concern, and there may be a way out of this. You had
21 offered, long ago, to get involved with this issue if it
22 became a problem, and we assured you, both when Mr. Ainley
23 had the case and when Mr. Butner took over, that we thought,
24 based on all of our experience together, we could solve this.

25 What we gave you was a sort of a

1 worst-case scenario, that if the State's list of witnesses,
2 which has expanded even more since we filed this motion, is
3 in fact their real schedule -- and for example, the 39th
4 supplemental disclosure they served on us last week lists
5 they're now up to 237 witnesses.

6 We have reason to believe that the actual
7 number of witnesses that the State would use at trial is some
8 significantly lower number. But just dividing that number
9 into days prior to trial, we think, would require us to set
10 aside three days a week from now until April to get all those
11 witness interviews done.

12 And I have said to Mr. Butner before, and
13 I think I've said in court, that to the extent possible, the
14 defense would staff and be ready for interviews on
15 essentially any day that the State indicated it would do
16 these interviews.

17 What I was hoping that the State would be
18 able to do -- and I am still hoping -- is to significantly
19 narrow and fine-tune their list of witnesses, from whom we
20 could then extract a list of people that the State believes
21 that they want to participate in the interviews and leave us
22 to do other interviews on our own. I know Mr. Butner wants
23 to do that.

24 I also know very well that Mr. Butner, as
25 the Court has observed on more than one occasion, is not

1 getting much dispensation on his side from other
2 responsibilities. I know these are hard things to do.

3 Detective Sechez, from the County
4 Attorney's Office, has been working with us. We've actually
5 completed almost entirely the review of all of the evidence
6 in the sheriff's department's possession in this case. We
7 had two full days of that last week, and at the end, with a
8 few things that we noticed, we think we have had a chance to
9 look at and inspect and photograph everything that the
10 sheriff's office had.

11 What I am looking for here, Judge, is
12 rather than an order directing Mr. Butner to do the
13 impossible, which is stop whatever else he is doing and spend
14 three days a week with us in interviews, as entertaining as
15 that would be, is to just ask the State to provide us, as
16 quickly as they can, a more refined list of witnesses, if
17 that is possible, so that we can decide what needs to be
18 done.

19 If the State's list is really 237 names
20 or something close to that, then we have a problem that we
21 probably can't solve. There aren't enough days to do it,
22 unless big changes are made in the way things are done. So
23 that is where we are in witness interviews.

24 We are very mindful that you must get
25 more motions to continue from the defense in other kinds of

1 cases, based on inability to complete witness interviews than
2 any other subject. We want the Court to understand that we
3 have tried and will try to do whatever we can to do that. We
4 are very much interested in keeping this May trial date and
5 be ready to go.

6 And everything we have done and
7 everything we continue to do is all focused on that as a real
8 trial date. And we do not want to be in a position to have
9 to ask the Court for more time because witness interviews
10 haven't been completed. We will find other ways to get that
11 information. That is where we are today, Judge.

12 So what I would ask for, in connection
13 with this motion by way of relief, is that the Court direct
14 the State within a reasonable period of time to provide us
15 with a list of witnesses that it actually intends to call at
16 trial, at the guilt/innocence portion of the trial, and to
17 the extent that they are willing to do that, identify those
18 witnesses that they -- for example, law enforcement
19 witnesses, that they ask us to schedule through them -- and I
20 am hopeful we can do that.

21 THE COURT: Mr. Butner.

22 MR. BUTNER: Judge, first of all, I think the
23 defense has acknowledged that they have gotten to look at and
24 examine almost every piece of evidence in this case now. And
25 I am sympathetic to Mr. Sears' remarks about witnesses and

1 narrowing that list and so forth.

2 In fact, I told him -- and I had hoped to
3 be able do that before today's date, but I have not been able
4 to. Some of that has been as a result of Detective
5 McDormett's family's health, so to speak. They are passing
6 the flu around in his family and -- in fact, he is home today
7 with his child.

8 So we haven't been able to get together
9 and go over the witness list to cull it down, so to speak, to
10 be a more meaningful number. I do plan on doing that very
11 soon. I would ask that the Court not order me to do it
12 within some specified time frame, but I believe that it would
13 be accomplished within the next couple of weeks.

14 And I will get that to Mr. Sears so
15 that -- that that's not just for Mr. Sears's benefit, quite
16 frankly. That is for mine, too -- the State's too. We need
17 to focus the case.

18 In terms of prioritizing interviews, I
19 would like to do that, too, and that is a little different
20 than what Mr. Sears has suggested. What I mean by that is I
21 think that when I go through that witness list with Detective
22 McDormett, I will be able to say that, look, these are, so to
23 speak, "A" witnesses that are extremely important and require
24 in-depth interviews -- for example, Mr. Sears, I think, wants
25 to interview Detective Kennedy relatively soon, and has

1 mentioned that to Detective Sechez, and we are going to try
2 to get that accomplished as quickly as possible. She would
3 be a very important witness in this case.

4 There are other law enforcement witnesses
5 of a similar nature, but, as the Court is well aware,
6 Detective McDormett and Detective Brown -- they have been
7 examined at length on the witness stand, and I would suspect
8 there is not much new that they might have to provide the
9 defense in this case.

10 So the long and the short of it is that
11 we will get this done. And part of the reason that we
12 haven't gotten it done is because we have been involved with
13 these hearings before this Court, as of late, for a lot of
14 time.

15 THE COURT: Any chance that you can get with
16 McDormett by telephone, and he have a list and you have a
17 list and start culling those down before Thanksgiving?

18 MR. BUTNER: I would hope that I can get
19 something done with him before Thanksgiving. I would have to
20 be out of court in order to do that, Judge, and I have been
21 in court quite a bit lately.

22 THE COURT: Would the County Attorney respect
23 an order from me to relive you of all your other cases so
24 that you can concentrate on that?

25 MR. BUTNER: It don't think so, Your Honor. I

1 think you know that. I can tell your tongue is in your check
2 when you make that remark.

3 MR. SEARS: I would be happy to speak with
4 Mrs. Polk about that.

5 THE COURT: I imagine that would carry the
6 day.

7 MR. BUTNER: Yeah. But Mr. Sears and I are
8 going to get together very soon for Detective Kennedy's
9 interview, and I hope that I will be able to provide him with
10 a culled-down list about the same time that we get
11 Ms. Kennedy's interview accomplished.

12 THE COURT: I recognize that I am keeping you
13 away from those sorts of things.

14 Are you personally needing to be involved
15 in each of the -- I mean, if you have a case that is going in
16 Judge Darrow's court or something -- is Mr. Sechez going to
17 sit in on some of --

18 MR. BUTNER: Mr. Sechez, in fact, has been
19 sitting in for the evidence review. I would have liked to
20 have been there a lot more, but that absolutely was an
21 impossibility.

22 So the long and the short of that is he
23 will be there on those interviews that I can't be there for
24 and maybe somebody else even, and I will be there for the
25 ones that I absolutely have to be there for.

1 THE COURT: The ones you regard as more
2 important?

3 MR. BUTNER: Absolutely. And that is what I
4 was talking about when I said prioritizing, too. I don't
5 think that I'm the one that decides what absolutely is a
6 priority interview.

7 I suspect the defense and I will agree
8 that we have certain witnesses that are much more significant
9 than others.

10 THE COURT: There might be some disagreement
11 about who's in which column between the two of you.

12 MR. BUTNER: Right.

13 MR. SEARS: Judge, I had a couple more
14 observations.

15 THE COURT: Please.

16 MR. SEARS: By our count, we are 22 weeks out
17 from trial today. The date that we are looking at to do the
18 interview of Detective Kennedy is two weeks hence -- not next
19 week but the following Wednesday, the 2nd of December. That
20 would put us 20 weeks out. And it doesn't look like we are
21 going to get any interviews done with anybody else, in all
22 likelihood, although we might be able to do other interviews
23 between now and then.

24 And I appreciate all of what Mr. Butner
25 said, and it's nothing that Mr. Butner hasn't said to us

1 privately in the past. However, the fact remains that in
2 order to just divide interviews into days, the pace has to
3 pick up dramatically. And we are going to have to rely on
4 Mr. Butner's office, whether it is Detective Sechez or
5 Detective McDormett or somebody else or some combination of
6 them -- we're going to have to be --

7 THE COURT: I am not sure I heard that from
8 Mr. Butner.

9 Do you believe that all the interviews
10 have to be set up through somebody in your office, either
11 Mr. Sechez or you, or can you give Mr. Sears a list of those
12 persons that you don't care to be present at?

13 MR. BUTNER: Judge, I wish I could control
14 Mr. Sears, but I can't. And I think he knows that he can go
15 out there and interview people, if he feels the need to do
16 so.

17 Of course, I would like to set up a
18 number of these interviews, and of course I would like to be
19 present -- or at least he could give us notice of when these
20 interviews are taking place. I am sure that the major
21 witnesses, so to speak, would both want to be there, and we
22 both want to do those interviews.

23 THE COURT: You know, I know, and Mr. Sears
24 knows that some people simply won't talk to him, though,
25 unless your folks are there -- you or Mr. Sechez.

1 MR. BUTNER: I understand that. And to that
2 extent, we are there to help.

3 So I think that we can facilitate those
4 uncooperative witness interviews for the defense, so to
5 speak.

6 THE COURT: If you could cull a list and
7 separate this out somewhat, that identifies who you would
8 like to be present for, who you don't think you need to be
9 present for, I think that would be helpful to Mr. Sears'
10 side, as well. He can go about contacting those that you
11 have less interest in participating in.

12 MR. SEARS: Judge, I would just -- I know
13 Mr. Butner doesn't want to be under a court order, and I
14 think I can understand why, but if we don't have --

15 THE COURT: I am going to give a date,
16 Mr. Sears, if that is where you are going with that.

17 MR. SEARS: I would ask before Thanksgiving.

18 THE COURT: And what I would like you to do,
19 and even if it is by phone -- but the trouble is I know that
20 it may require some time after our hearings are over this
21 week to begin doing that.

22 But if you could commence doing that,
23 Mr. Butner, so that by Thanksgiving there is at least a
24 list -- an operational list that you can cull down to who you
25 are likely to call, who you are not likely to call, so that

1 things can be set in a priority.

2 That is what I am going to order that you
3 at least provide, to get with Mr. McDormett, even if it has
4 to be by telephone, and go over the 200-some-odd names that
5 you have -- those that are certain, and distinguish from
6 those who you are certainly not going to call -- and
7 distinguish them from -- in terms of who you don't need to be
8 personally present at versus the ones that you think you are
9 going to have to set up, simply by virtue of the fact that
10 you know right now that they are not going to talk to the
11 defense side unless you set them up.

12 So by Wednesday of next week, the 25th,
13 that is ordered.

14 MR. SEARS: Can I make -- thank you, Your
15 Honor.

16 Could I make one additional request of
17 the State in this case?

18 THE COURT: Yes.

19 MR. SEARS: We have counted, in that list of
20 237 witnesses, 15 witnesses identified as experts. And in
21 our mind, if they were going to be testifying experts or even
22 consulting experts, they would be A-listers, if there is such
23 a thing, on our side. And the first one of those people that
24 we --

25 THE COURT: How many experts are there?

1 MR. SEARS: 15 is the number that we came up
2 with.

3 THE COURT: Thank you.

4 MR. SEARS: And of them, we are particularly
5 interested in a man named Rod Englert -- the Court may know
6 him -- from Oregon -- who is an expert in blood spatter and
7 also crime-scene issues.

8 And prior to the start of the Chronis
9 hearing, prior to the October 2 cutoff, a seven-page report
10 from Mr. Englert was disclosed. But in that report,
11 Mr. Englert listed a chronology of his contacts with the
12 County Attorney's Office and said that at the end he had been
13 contacted and told to stop work for budgetary reasons and to
14 file a report.

15 So if Mr. Butner has an answer to this
16 question, we would like to interview Mr. Englert, in the very
17 near future, if he is going to be a witness for the State.
18 And it's that part of his report that causes us to pause and
19 wonder if this is going to be a witness.

20 THE COURT: Do you know the answer, at this
21 point, to that, Mr. Butner?

22 MR. BUTNER: I believe he is going to be.
23 Yes, Judge.

24 THE COURT: Okay. Then I guess you are on
25 notice.

1 MR. SEARS: And I believe I want to talk to
2 him. Thank you.

3 THE COURT: You are on notice that Mr. Sears
4 would like to speak with him earlier rather than later.
5 Thank you.

6 Anything else, Mr. Sears, on that?

7 MR. SEARS: No, Your Honor.

8 THE COURT: If there are problems with a
9 particular date and you need a conference call, let me know
10 that.

11 But I agree with Mr. Sears and with you
12 and your observation, as well, that we need to get going at a
13 faster pace on the interviews than things allow, currently.
14 If there is anything that I can do with regard to intervening
15 with your bosses, I would be happy to do that.

16 MR. BUTNER: Thanks for the offer, Judge.

17 THE COURT: I don't know if I would carry any
18 more sway than Mr. Sears would.

19 MR. SEARS: I am thinking possibly.

20 THE COURT: Hope I would.

21 Anything else on that issue?

22 MR. SEARS: No, Your Honor. Thank you.

23 THE COURT: The next one on the list was a
24 motion to compel in reference to certain biological evidence.
25 There was a motion that was made October 7th, and the

1 response filed by the State, I think October 8, and then the
2 reply on October 20th.

3 Is this yours, Mr. Hammond?

4 MR. HAMMOND: I think it is. My first request
5 is that we move back upstairs right away.

6 THE COURT: Denied. Unfortunately, they are
7 selecting a jury up in my courtroom.

8 MR. HAMMOND: Thank you for taking my motion
9 under consideration.

10 THE COURT: Although, I appreciate exactly
11 what you are saying. I am not that comfortable down here,
12 either.

13 MR. HAMMOND: This motion is one that I think
14 probably deserves a little bit of conversation this morning.
15 And let me start on an optimistic note on this one.

16 I think it is fair to say that Mr. Butner
17 and the people with whom he works have attempted, with some
18 success, in providing the information with respect to
19 biological testing that we have asked for. We still have
20 objections to the lateness of the disclosures, but I would
21 rather not talk about the question of lateness and what
22 possible sanctions might eventually arise from that, because
23 our goal, really, in filing this motion primarily was to get
24 to where we had all of the relevant information with respect
25 to the biological evidence, so that we could then do the

1 interviews and do, of course, the preparation necessary for
2 our experts. And I think on a lot of that they have come a
3 long way.

4 But there are, I guess, two or three
5 problems that continue, that I hope we can resolve this
6 morning. One thing we have asked for repeatedly and have
7 asked for in these motions and in numerous other
8 conversations is the chain of custody documentation with
9 respect to items of biological evidence that were collected
10 at the scene, taken into Property In Evidence, then removed,
11 taken to one or another of the two laboratories -- the
12 private Sorenson Lab or the D.P.S. lab in Flagstaff -- to my
13 knowledge, those are the only two labs that have been
14 involved in this -- and then eventually brought back and put
15 into Property In Evidence.

16 I honestly, Judge -- I don't understand
17 why there has been any reluctance to produce the chain of
18 custody. It is a standard form document that -- the State, I
19 am sure, agrees that having the chain of custody is important
20 for all of us. We need to know when things went from one
21 place to another. We need to be sure that things that needed
22 to be refrigerated were refrigerated. If there are things
23 that are still at the lab, we need to know that they are
24 there.

25 So having that record is bedrock for the

1 work that all of us have to do together. And I certainly
2 don't want to put -- I really don't like these situations in
3 which it sounds like some people in the County Attorney's
4 Office are saying that they are prohibited or forbidden from
5 giving us things we need by Mr. Butner, and I really doubt
6 that that's happened, but we have simply been stonewalled
7 on --

8 THE COURT: You don't have any chain of
9 custody documentation on --

10 MR. HAMMOND: I think we have either none or
11 virtually none. Certainly as to all of the important things
12 that we have looked at, we do not have.

13 THE COURT: Any disagreement or clarification,
14 Mr. Sears?

15 MR. SEARS: Judge, Mr. Robertson, our
16 investigator and I were present at all the evidence review.
17 And what we understand from the sheriff's department evidence
18 tech, who participated in this, is that for all items of
19 evidence, not just the biological evidence, that they have a
20 document they call an "invoice," which, on the front side
21 shows what was logged in, and literally the back of that
22 document and then some continuation sheets is the chain of
23 custody for each item.

24 Then she has told us that the evidence
25 department in the sheriff's office maintains their own little

1 internal database showing how things are moved and also when
2 things come out of evidence and go to the County Attorney.

3 THE COURT: On computer, then?

4 MR. SEARS: Yes. And so the first line of
5 information that we would want, particularly for the
6 biological evidence for the reasons that Mr. Hammond has
7 given you here, but also for all of the evidence, are copies
8 of the backs of all the invoices for all the items that we
9 have now looked at. It is in the hundreds.

10 But we were told as recently as last week
11 that that was not going to be provided to us, and we didn't
12 have it, so we thought it was important.

13 THE COURT: Mr. Sechez was with you at the
14 time, I believe?

15 MR. SEARS: Yes, sir.

16 THE COURT: And so was there a request made of
17 Mr. Sechez when you were there or of the person -- the
18 evidence tech that you were dealing with to just do it at
19 that point?

20 MR. SEARS: We have done the evidence review
21 in two pieces. One review of mostly documentation, paper
22 evidence, things that fit in envelopes, was done at the end
23 of August. And then we looked at larger items of physical
24 evidence, like the bicycle and golf clubs and
25 things that -- automobiles and things -- and also frozen

1 evidence -- evidence that was kept in a big walk-in freezer.
2 And that was done over the last week to get done.

3 And we had this conversation -- I feel
4 better letting Mr. Sechez or Mr. Butner on his behalf explain
5 what the position is. But we came away with the sense that
6 we are just not going to be provided with that information,
7 and the fact is we don't have it. We just never -- we don't
8 have it.

9 THE COURT: Back to you, Mr. Hammond.

10 MR. HAMMOND: On this issue, maybe we --
11 obviously, Mr. Butner needs to be heard from.

12 I was present for one day of the
13 evidence, and to say that there was a request for the chain
14 of custody would be, I think, an understatement. I think it
15 was pretty clear that we wanted that stuff, and it was pretty
16 clear that Mr. Sechez was not in a position to give it to us.

17 THE COURT: Do you mind taking it in this
18 fashion, Mr. Butner? I was going to go have him just go
19 through what else he thinks is --

20 MR. BUTNER: I would like to take it in this
21 fashion because, as I just leaned over to John and said, "Why
22 didn't you talk to me?"

23 Judge, first of all, I've just asked Deb
24 here, who has got all of this stuff on disk, to look, and we
25 just pulled up numerous sheets of chains of custody that have

1 been disclosed. I could give you Bates numbers. Okay?

2 But I think it isn't probably the ones
3 that you are customarily used to looking at, and I do know
4 what you are talking about when you say the sheriff's office.
5 And I guess Mr. Sechez said to you that he is not going to
6 give you those things. Well, he is not. I will. You know,
7 he is not in charge of that kind of stuff.

8 And we will make sure you get the -- I
9 mean, I have to have the chains of custody. I don't get to
10 put anything into evidence, you know. I can see Mr. Hammond
11 standing up and going, "Hey. Where is the chain of custody
12 on this?"

13 THE COURT: Would you like a deadline on that?

14 MR. BUTNER: I would not like a deadline. I
15 get these deadlines all time, you know? And in this
16 particular case, this is the first time it's even been
17 mentioned to Joe.

18 MR. HAMMOND: Wait. Wait.

19 THE COURT: I know it's mentioned in the
20 motion itself, October 7.

21 MR. BUTNER: Judge, we can show you right now
22 that we have provided chain of custody documents. I don't
23 know what the problem is in terms of them not recognizing
24 them for what they are, but I got Bates No. 2706 and numerous
25 others in connection with that.

1 MR. HAMMOND: What has happened is -- and
2 maybe I should have just called Mr. Butner myself -- but what
3 I have seen -- and I can't tell you that this has been true
4 in 100-percent of the cases -- but in everything I have seen,
5 what we have gotten is the -- what I think you call the
6 "property invoice," which is the front of the sheet. We were
7 told, and I think this is common practice, that the chain of
8 custody is on the back of the sheet. The backs of those
9 sheets, at least as to the biological evidence in which we
10 have an important interest, we have not seen. And when asked
11 about that, we were told that that was something we would not
12 be given.

13 So that is the state of our
14 understanding. But I am sure you are right, that this is not
15 something that the State wants to fight about. But it was in
16 our motion, it was in our reply, and it remains unresolved.

17 MR. BUTNER: Well, we certainly didn't
18 understand what you were talking about, I guess. I mean,
19 because we thought we provided these things to you, and we
20 have been all along.

21 THE COURT: Well, there being no objection, I
22 will order that the front and back be provided.

23 MR. BUTNER: Yeah, we'll give you the
24 backside, too. I thought that it had been provided, but
25 apparently not.

1 THE COURT: There is a question, I suppose, as
2 to the -- what I am being told -- is the computer information
3 within the lab?

4 MR. SEARS: The sheriff's office, actually.

5 THE COURT: Yeah. Excuse me. The sheriff's
6 office. The evidence room.

7 I don't know to what extent that
8 information only pertains to where it is within the sheriff's
9 office or whether it pertains to sending information.

10 MR. BUTNER: I think that we are talking -- if
11 they are talking about computer stuff, I think you are
12 talking about how the evidence people control where stuff is
13 located inside the evidence room?

14 They don't want to give that out. I will
15 just tell you that. That is their own little program for
16 where they put stuff in there, but it is not chain of
17 custody.

18 THE COURT: I don't see a need if it is only
19 in regard to location, where within the facility certain
20 objects are, Mr. Sears.

21 MR. SEARS: And let me be fair to Mr. Butner.
22 You might make note of this. I'm going to try to be fair to
23 Mr. Butner.

24 MR. BUTNER: I will wait and see.

25 MR. SEARS: Judge, what the evidence tech --

1 with whom we developed a pretty good relationship, because we
2 spent a lot of time with her -- told us about this computer
3 program is that in addition to showing where things are --
4 which shelf and which room and those kinds of things -- it
5 also shows, what we think is an important circumstance for
6 later inquiry, when things left there and went to the County
7 Attorney's Office for purposes of being disclosed to us.

8 And then we were also told --

9 THE COURT: To the County Attorney's Office?

10 MR. SEARS: Yes. And we were also told that
11 the County Attorney's Office maintains a database of some
12 sort that is reflexive of this, that shows when they get
13 items and when they are processed and when they are turned
14 around and disclosed to us.

15 And as Mr. Hammond said and I have said
16 today and certainly on other occasions -- here is where I am
17 going to be fair -- that prior to Mr. Butner's involvement in
18 the case, there was, as we see now, a backlog -- that
19 things -- that work was done and evidence created, and only
20 when Mr. Butner became involved in May and June of this year,
21 did that garage get emptied, essentially, and sent to us.
22 And we have gotten a steady stream of disclosure from May and
23 June of this year to as recently as last week of things that,
24 when we look at them, were done in 2008, for example.

25 And so it's important for us to

1 understand -- and here comes another "fair" comment to
2 Mr. Butner -- we understand that Mr. Butner recognized this
3 problem and this backlog and was trying to act on it, but
4 that, as you observed earlier today, the State is the State
5 is the State. And all of this material that was done months
6 and sometimes even more than a year ago that has been
7 backlogged, just because it's kicked loose and disclosed to
8 us now, doesn't address the issue of this Court's previously
9 enclosed discovery deadlines and may become the subject of
10 important motions to be raised in January hearings, regarding
11 the timeliness and admissibility of that.

12 So it is important for us to know as much
13 as we can about when the evidence was collected, what was
14 done with it, how it's been shuffled back and forth, what's
15 at the lab, and when the County attorney knew about it and
16 what they did about it, because those are our concerns. And
17 it all ties to this larger problem that Mr. Hammond is
18 talking about -- I will let him finish -- but this larger
19 problem of this case didn't start when Mr. Butner got the
20 case.

21 This case started on July 2nd, 2008. And
22 evidence was collected that night and the next morning in
23 this case, some of which has actually just been described to
24 us within the last 10 days. It's evidence that's
25 15-and-a-half months old in this case. That is a problem for

1 us. It's not the subject of this motion, particularly, but
2 that is a recurring problem.

3 So for that reason, having the County
4 Attorney's information about this, which I think out of
5 fairness under obligation of candor to the Court they ought
6 to give up, the sheriff's department information and the
7 chain of custody information, we will be able to put that all
8 together and piece together a history for these items that
9 tells us what was done with it, when it was looked at, and
10 perhaps really importantly down the road, why it took so long
11 to get the information to us.

12 That is my speech, wherein I was twice
13 fair to Mr. Butner.

14 MR. BUTNER: Duly noted. But let me clear up
15 a misunderstanding.

16 First of all, there is no sharing of a
17 computer program or anything by the sheriff's office with our
18 office. Okay? I don't know where you got that information,
19 but it's misinformation.

20 I guess they do have some sort of a
21 computer -- and this is what I was talking about before --
22 some kind of a computer program spreadsheet sort of a deal
23 where they have -- where evidence is located. That's
24 internal, and the County Attorney's Office doesn't have
25 anything to do with that. Just simply doesn't take place.

1 In terms of --

2 THE COURT: I don't have any interest in
3 ordering the sheriff's office to disclose information with
4 regard to location within their facility or facilities,
5 plural, of where items of evidence are or have been kept.

6 I think what Mr. Sears was talking about
7 was is if there is some information in a program with regard
8 to timing of when items were provided to the County
9 Attorney's Office, if you would speak to that.

10 MR. BUTNER: Judge, I don't know about that.
11 It's the sheriff's office program, I guess. I just simply
12 don't know about that. It isn't shared with the County
13 Attorney's Office, and --

14 THE COURT: Do you have any objection if they
15 have such a list of information as to when items went to the
16 lab that are kept on other records other than the chain of
17 custody direct records?

18 MR. BUTNER: I do. I think that that is
19 getting into their internal control of the evidence. I will
20 tell the Court and counsel that the backs of these chain of
21 custody sheets will be provided by the end of the week. And
22 the only reason it wouldn't be provided by tomorrow is
23 because I want to make sure that Mr. Sechez has enough time
24 to copy all of that stuff. And had I understood that that
25 was an issue, it would have been taken care of quite sometime

1 ago. I didn't realize that that was a problem.

2 THE COURT: With regard -- I am going to
3 charge you with the obligation to find out if their program
4 specifies whether or not items are sent in a separate format
5 than the evidence sheets so that -- not location, but when
6 they are sent out, either to a lab or other location, so that
7 a comparison can be made between the documents kept by the
8 sheriff's office as to the legitimate timing of that. And I
9 think the defense is entitled to that.

10 So check whether such a thing exists. If
11 it does, I will require that you disclose the timing of when
12 the various items were sent out. Not location.

13 MR. BUTNER: I understand, Judge, and I just
14 made a note of that.

15 In our office -- and maybe this is where
16 the confusion lies -- we sign for copies of evidence when we
17 receive it from the sheriff's office. And we have a copy of
18 all of those things; right? Okay. Almost all of them. I
19 don't know if we have all. But we can give copies of those
20 things to them.

21 Is that what you are talking about?

22 MR. HAMMOND: That might help. Let me tell
23 you one of the problems that we observe.

24 When we see an item of evidence in the
25 Property In Evidence room, it has an evidence number. When

1 we get disclosure, the disclosure -- and I don't know how
2 many thousands of pages we are at now -- but it comes with a
3 Bates number.

4 Often, we have had the problem of not
5 being able to figure out whether the property item was the
6 same thing that was produced when we got the disclosure. But
7 we were told -- and I am sure that this is right -- that
8 somewhere there is a document that traces that history, that
9 gets us from the property number that the sheriff's office
10 put on an item and your production of it. That has to exist
11 somewhere.

12 That would be very helpful to us, because
13 there are items that we can't tell whether this was really
14 the property item that we got or not.

15 MR. BUTNER: Okay. I kind of understand, and
16 I talked to Deb about this a couple of months ago, and it is
17 a work in progress because it's so voluminous. But what is
18 going on right now -- and correct me if I don't say this
19 right -- we have got, in essence, a log that is being
20 prepared where -- we are doing it with the new items and
21 we're catching up on the old items -- where the Bates numbers
22 correlate with the evidence numbers.

23 I think that is what you are asking
24 about; right?

25 MR. HAMMOND: It is.

1 MR. BUTNER: And we are trying to get that
2 done. And I will tell you, I have been all over her about
3 that.

4 THE COURT: Are you willing to share that with
5 them?

6 MR. BUTNER: Oh, yeah. As soon as we get the
7 thing done, we are going to share it. If you want us to
8 share with you, the partially completed log, we will do that.

9 She says it is disclosed every time we
10 disclose. Maybe you don't understand what it is.

11 MR. SEARS: Maybe so there is no confusion
12 here, what we get from the State is an index every time we
13 get a supplemental disclosure, and we are up to, I think, 39
14 now, that shows -- that has descriptive language in it and
15 will say "Report of Rod Englert, Bates No. so and so."

16 What we are asking for is -- that report,
17 as it turns out, has a Yavapai County Sheriff's Office
18 evidence number attached to it. So what we have had
19 difficulty doing is matching up our review of the evidence
20 and the database that we created from that with the
21 disclosure.

22 So we think that what is missing is --
23 are the sheriff's department evidence numbers. I think
24 Mr. Hammond has an example of what we are talking about here.

25 MR. HAMMOND: Your Honor, might I confer just

1 with Mr. Butner for a moment about this?

2 THE COURT: You may. Go off record.

3 (Whereupon, a discussion was held off the record.)

4 MR. BUTNER: Can we go back on the record?

5 THE COURT: Yeah. We're back on the record.

6 MR. BUTNER: Do you want to speak,

7 Mr. Hammond?

8 MR. HAMMOND: Go ahead.

9 MR. BUTNER: We were just showing defense
10 counsel how this log is prepared and is being disclosed. And
11 I think that now they realize that they have been getting, to
12 the extent that we have gotten it accomplished, the log.
13 They estimated that we are about a quarter done. I don't
14 know. She is saying they are being kind.

15 We are doing the best that we can in that
16 regard, and it is an on-going process. The new stuff is
17 being done, and the old stuff is being caught back up, just
18 as I described. And hopefully, we will get it done
19 relatively soon.

20 And I will tell you that this is the
21 paralegal on this case.

22 THE COURT: So to the extent that she is in
23 court, the same is the true of your interviews.

24 MR. BUTNER: It is kind of the same problem,
25 you know, but she has been working very hard and diligently

1 on this. And I do expect that -- you know, it's a big task,
2 but I do expect that we will get it done as quickly as
3 possible.

4 THE COURT: You are willing to provide that?

5 MR. BUTNER: Yes. Absolutely.

6 THE COURT: You indicated -- so three are
7 missing. I have addressed that, I think.

8 MR. HAMMOND: I think so.

9 THE COURT: What else are you missing that you
10 need?

11 MR. HAMMOND: On the chain of custody, I think
12 there really are two problems here. One is the
13 cross-referencing, and that is what we were just talking
14 about.

15 And we will -- I think what we ought to
16 say today is that everyone now knows that this is a priority.
17 We will cooperate in any way we can, obviously, but we need
18 this done as soon as it can be done. If it is being
19 addressed promptly, then we will trust that the system will
20 work that out.

21 MR. BUTNER: Thank you.

22 MR. HAMMOND: On the chain of custody itself,
23 I think that between Mr. Sechez and the County attorney, they
24 are going to take care of that right away. They are going to
25 copy for us the backs of the forms so that we can have that,

1 and indeed I think they may do us the courtesy of going ahead
2 and giving us that even before they get it all Bates-stamped.
3 And a copy will be given to the County Attorney's paralegal
4 so it can get into our system. But it will expedite the
5 process if we have that. So I think that will take care of
6 what I believe is most of the chain of custody.

7 There is one additional chain of custody
8 problem that I hope we can also sort out here. As we said in
9 our motion, the chain of custody on biological evidence,
10 obviously, lives beyond the moment that it leaves the
11 sheriff's department. When it goes to D.P.S. or it goes to
12 the Sorenson Lab, there is a chain of custody there. It is a
13 critical part of their work in their laboratories. I
14 believe -- and again, I could be wrong -- but I believe we
15 have not received any chains of custody for the examination
16 of evidence by those labs.

17 THE COURT: Internally within the lab.

18 MR. HAMMOND: Internally. And I know they
19 always have it. There is just no doubt about it. And I
20 don't think we have been given it. That was one of the
21 things that we had included in our motion.

22 MR. BUTNER: Judge, if I could, I could
23 address that.

24 THE COURT: Please.

25 MR. BUTNER: I'm just looking at -- for

1 example, Bates No. -- I think that's 3091. It is entitled
2 "Internal Chain of Custody Report." And it documents the
3 item description, "TSMEC extract 1107, 1108, 1109, 1110,
4 1111, 1112, 1113, 1114, and basically just establishes that
5 she's relinquished it at thus and such a time and has her
6 initials on it and so forth. It's an internal chain of
7 custody document.

8 THE COURT: And does it document which
9 sheriff's office number -- identification number it is
10 pertaining to?

11 MR. BUTNER: No. Unfortunately. Here is the
12 way they do that -- and these guys know that as well as I do.

13 D.P.S. then has their numbers, and so you
14 go from one number to another and -- you know, if they could
15 make this more confusing, gee, I would really like to
16 congratulate them, if they could, because I can't see how
17 they could make it any more confusing.

18 THE COURT: That's a D.P.S. report?

19 MR. BUTNER: Right. That is by way of
20 example, because -- we provide those with every one.

21 THE COURT: Sorenson -- do you have any from
22 Sorenson?

23 MR. BUTNER: She is looking for that right
24 now.

25 And also, I think, just to let the Court

1 know, we -- they asked for accreditation stuff, and we got
2 the accreditation stuff from Sorenson now. But to get into
3 their internal procedures, Sorenson has taken the position
4 that they are going to charge us a bunch of money to do that.

5 And if the defense wants to inquire and
6 have them spend a bunch of money to give the internal
7 procedures and document all of that, then the defense needs
8 to pay for that. And they will be happy to do it, and they
9 were going to bill us 250 bucks an hour to research that kind
10 of stuff.

11 MR. HAMMOND: Well, they'll give it to them.
12 Someone is going to have to pay for it. And my guess is it's
13 going to be the State of Arizona, one way or another.

14 MR. BUTNER: That's the way it always is. As
15 a taxpayer I can say that.

16 We haven't been able to find any
17 Sorenson, so we will see what the problem is with Sorenson in
18 that regard. They certainly have to provide chain of custody
19 documents, and that shouldn't be an issue.

20 THE COURT: I will direct that you provide
21 that information to the defense as soon as possible.

22 MR. BUTNER: Okay.

23 MR. HAMMOND: And while we are on Sorenson,
24 let me move to one of the other items that I believe is not
25 yet resolved.

1 We have asked for the software utilized
2 both by D.P.S. and the Sorenson Lab for their analysis, and
3 we haven't gotten it. Maybe this is part of Sorenson's
4 objection. I can't imagine that it is, but --

5 THE COURT: You are talking about not
6 receiving the software; a listing of the software that they
7 used.

8 MR. HAMMOND: Right. So we know which
9 programs they used, because that's what they do to establish
10 their thresholds. And obviously, their sensitivity
11 thresholds are critically important to understanding what
12 their conclusions are when they say that a particular sample
13 is inconclusive, for instance. So without that software, we
14 don't really know anything other than what they've concluded.

15 MR. BUTNER: So you want it identified by
16 name -- the software; is that what you're saying?

17 MR. SEARS: With as much detail as possible.

18 MR. HAMMOND: Yes. And I think if they give
19 us a list that describes the software with particularity, I
20 think our people can figure out what it is. So we put in our
21 motion, I believe --

22 THE COURT: That is on Page 3 of the reply,
23 what they are specifically looking for, the listing of
24 commercial software programs used in the testing, the name,
25 the manufacturer, and which version it is -- if it's 2.0 or

1 2.1 or whatever.

2 MR. BUTNER: I think that's the stuff that we
3 are getting a hard time from Sorenson on, in terms of
4 spending money to research and provide to the defense.

5 MR. HAMMOND: Well, here is what my experience
6 suggests. I believe that if -- if step one, they will simply
7 tell us which software they are using and confirm that they
8 have not done their own modifications of it, then we can at
9 least debate over whether they should provide that software
10 to us or whether we should ask the Court to buy it for us.
11 But I think we need to know that. It would be almost
12 unthinkable that a laboratory wouldn't be able to answer that
13 question.

14 MR. SEARS: And that would be to the extent,
15 Your Honor, that our experts don't have that same identical
16 software available to them, which may well be the case.
17 There are some industry standards at play here.

18 THE COURT: I imagine there are.

19 I will direct the State provide to the
20 defense a list of the software programs used in the DNA
21 testing in the case, whether from the D.P.S. crime lab or
22 Sorenson, specifically the name of the software program
23 manufacturer and which version was used by the respective
24 lab, and simply an indication of whether or not the version
25 was used with or without modification by the lab itself.

1 MR. BUTNER: Got it.

2 MR. HAMMOND: And Your Honor, that may
3 comprehend our Item 5 on that same page, the macros. I am
4 now a little bit out of my depth, but I believe there is a
5 related question. If the operation of the software depends
6 upon instructions given in their macro, then we need to know
7 that, too. They will probably provide that, but we were told
8 by our experts that this is important to include, as well.

9 THE COURT: I will specifically also direct
10 the State to obtain from the two labs information as to
11 whether the results produced are dependent on instructions
12 contained in macros, and if the answer is affirmative, then
13 copies of the macros used or identification of how to obtain
14 copies of the macros used. And if it is something that is
15 proprietary, I guess we need to know that.

16 MR. BUTNER: I don't really understand what
17 you just said. Thought I'd just tell you.

18 MR. SEARS: Did you write it down?

19 MR. BUTNER: I did, and I still -- I'm looking
20 at it and I have not a clue what you just said.

21 THE COURT: I am granting No. 5 of the reply
22 set of paragraphs.

23 But at this point, to identify it, if the
24 macros are commercially available, if they can identify that
25 the macros are commercially available and what the

1 instructions are, if they are standard instructions within
2 the field of expertise, then I don't think they need to
3 specify anything other than that. But if they are something
4 specific that modifies the methodology, so that the
5 methodology can be replicated by the experts, if any hired by
6 the defense, I think they need to know that.

7 So I am only seeking, or ordering on
8 behalf of the defense who is seeking, information. Not
9 directing copies to be provided or research necessarily to be
10 provided.

11 MR. BUTNER: Okay.

12 MR. HAMMOND: Your Honor, in that connection,
13 we probably should get back to Mr. Butner on one other
14 element here.

15 We believe that we have received from you
16 the lab protocols, but as we are sitting here now, I am not
17 sure that we actually got them from Sorenson.

18 MR. BUTNER: I'm informed that that is part of
19 what they want to charge for, is their laboratory protocols.

20 MR. HAMMOND: We ought to at least be told by
21 them what their objection is to production, what cost they
22 would --

23 MR. BUTNER: 250 an hour.

24 MR. HAMMOND: I can't imagine -- frankly --

25 THE COURT: But in terms of protocols, what

1 they are being asked to do is to make copies of existing -- I
2 mean, to have somebody stand at a photocopier and copy it, is
3 I understand what the request is. So I guess I would like to
4 know, if you don't mind checking on that issue, what the cost
5 represents and why they are asking for it and what their
6 specific objection is. Because other than that, it is simply
7 asking for something that may be available already on a
8 computer download to a DVD disk that would take ten seconds.

9 MR. HAMMOND: I think we can say with some
10 confidence that private labs have been called on to produce
11 protocols in lots and lots of cases. So I don't think this
12 would come as a surprise, and I don't think it would require
13 original research.

14 But if there is some question about it,
15 we can certainly address it, but I doubt that there is. I
16 suspect it is a miscommunication.

17 THE COURT: If they can give us a PQ of even
18 at that rate what they anticipate the cost to be. I would
19 appreciate --

20 MR. SEARS: And if they are hiring any
21 photocopy help, if they would consider my application.

22 THE COURT: At 250 an hour, I may walk down
23 there myself.

24 MR. SEARS: We can carpool.

25 MR. HAMMOND: Your Honor, before I leave the

1 biological evidence matters, there have been a couple other
2 biological evidence things that have come up in the last few
3 weeks that have taken us back to the concerns that we have
4 expressed about the late disclosure. And there are two in
5 particular that are now simmering, that it seems to me would
6 be worth talking about with the Court for a few minutes.

7 As Mr. Butner knows, the D.P.S. lab has
8 apparently expressed some interest in doing some additional
9 biological testing. And that biological testing, at least to
10 our knowledge, has not yet occurred. Actually, it began to
11 be an issue for us when we were trying to figure out what the
12 chain of custody was.

13 But one of these matters refers to an
14 item of clothing that the victim was wearing at the time of
15 the homicide. And we were told very recently that the D.P.S.
16 lab would like to do some additional testing.

17 Well, we went back and looked, and our
18 records don't show that they ever did any testing of this
19 particular item. And our records also suggest, at least from
20 the evidence review that we did in August, that this
21 particular item of evidence has been at D.P.S. for some
22 period now, more than three months since the evidence review
23 was done in August.

24 I don't want to supplement the record
25 here, but just so the Court knows what we are talking about,

1 might I just show the Court a photograph of the item?

2 THE COURT: Yes.

3 MR. HAMMOND: If I filed it, I would want to
4 file it under seal, but I would like the Court to know what
5 we are talking about, and I will show it to Mr. Butner first.

6 THE COURT: Thank you.

7 MR. HAMMOND: The item itself, I think without
8 much conversation, we can say is obviously covered with
9 biological evidence of some type. It may be that the
10 laboratory has discovered other forms of biological evidence
11 other than the most obvious items on here.

12 But the lack of any evidence with respect
13 to this particular item and the existence of testing now and
14 a question, which Mr. Butner was good to raise with us, about
15 whether that testing might be destructive -- whether there is
16 something that would be tested here that would result in the
17 elimination of the ability to examine part of that evidence
18 is something that we -- I think our first position is that it
19 shouldn't be happening at this stage of the case.

20 And I do not blame Mr. Butner for that,
21 but I think it is really quite -- I don't want to say it's
22 unimaginable, but it's hard for me to figure out how at this
23 late date they could still be conducting an examination of
24 that item. But we don't want to say don't do it.

25 THE COURT: I was going to ask that. I

1 wouldn't think that you don't want them to at least make an
2 attempt.

3 MR. HAMMOND: I think what we need is really
4 serious cooperation and maybe some deadlines on this kind of
5 thing. We have a laboratory that has been assisting us.
6 They are quite good.

7 We have offered to have people from our
8 laboratory go to D.P.S. to participate in the extraction and
9 observe the testing -- the extraction actually being more
10 important than the testing itself. There is not a lot, you
11 can tell when you see the testing, but the extraction is
12 important. But we've been told that D.P.S. will not allow
13 that. They won't allow anyone -- even an accredited
14 laboratory representative in their laboratory.

15 We said fine, bring the item to our
16 laboratory, which is an accredited lab. Have someone from
17 D.P.S. come to our lab, and we will do it. I suspect that
18 D.P.S. objects to that.

19 And so here we are with, you know, five
20 months to go to trial, with evidence that may be critical
21 that is just not being processed in, what I think any of us
22 would think of as, an expeditious matter.

23 And I frankly was particularly concerned
24 about this when we went back to our records and found that it
25 had been at D.P.S. for at least three months. If it had just

1 been something that somebody had had an "ah-ha" moment and
2 had said, "My, God, how did this happen," I think I could
3 understand it. But this is an item that they have had for a
4 long time.

5 And so we were grasping, I think, for
6 some help from the Court and the County Attorney for how to
7 bring this to a successful and prompt conclusion. And
8 particularly if anything is going to be destroyed, we think
9 it is essential to have an order that we be able to have
10 someone present.

11 THE COURT: Is this something new to you,
12 Mr. Butner?

13 MR. BUTNER: Well, it is not new to me. In
14 fact, Mr. Hammond kind of described how this came about, and
15 that is we became aware that this item was at the lab and had
16 not been tested and said, "Hey, what is up with this? We
17 need this item tested."

18 And that happened just recently.
19 Detective Sechez and I talked about this. And as soon as we
20 discovered that, I got in touch with Mr. Sears -- and found
21 out from the lab, too, that it would require destructive
22 testing. And I let Mr. Sears know that, and he said don't do
23 it. Okay? We want to have somebody present. We contacted
24 the lab, and they said we won't let anybody inside our lab.

25 Now, what did not take place -- and I'm

1 glad to hear Mr. Hammond offer it -- and that is an offer
2 that, okay, we can do it at our lab. I never got such an
3 offer from either Mr. Hammond or Mr. Sears. I hear it now.

4 He didn't, John.

5 MR. SEARS: I can e-mail it over the lunch
6 break.

7 MR. HAMMOND: I don't think we have to wait
8 for the lunch break.

9 MR. BUTNER: Okay. You know, I don't have an
10 objection to that. We thought that it would have to take
11 place in a private lab, and was not identified any specific
12 lab that the defense was using.

13 But it may be that that lab would be
14 acceptable, or we could get Sorenson or even some other lab
15 to do this testing. But I do think that the testing should
16 be done. And it was, as Mr. Hammond described, an "ah-ha"
17 moment, where we discovered that "Hey, didn't test this.
18 What's up? Why not?"

19 THE COURT: Given the volume, why is it that
20 you think it would be destructive?

21 MR. BUTNER: They just told me that they
22 managed to extract such a small amount of whatever, that any
23 testing of it would be destructive.

24 MR. HAMMOND: What I suppose is happening here
25 is that there is some non-blood DNA evidence that was found

1 by microscopic -- they do a kind of a -- a magnifying
2 glass -- I guess is a better phrase -- look at the item. And
3 it may be that in doing the magnifying glass look, they found
4 something other than blood that might contain DNA that we
5 can't see.

6 THE COURT: Or that they think may be
7 biological.

8 MR. HAMMOND: We can't see it with the naked
9 eye.

10 But the destruction part of it really
11 comes with the extraction. If somebody has already done the
12 swab, that has either consumed the sample or it hasn't.

13 THE COURT: What is the status quo?

14 MR. BUTNER: Here is what happened, as I
15 understand it.

16 On this particular item, it looked
17 like there might -- this was an item that we thought, well,
18 maybe -- we got information from Mr. Englert that maybe
19 fingerprints could be obtained from this item of clothing,
20 which -- you know, I didn't know about that. Okay?

21 So then there is this special kind of
22 process that you have to do. And then we said, well, before
23 we do the fingerprint-type thing, we better check to see if
24 there is any DNA, if you think that somebody had their hands
25 on there. And then D.P.S. analyzed it and found some sort of

1 item of DNA in that regard. But I don't know if it was not
2 blood or what it was. I don't know exactly how that took
3 place.

4 And then I found out -- that's when they
5 said, well, you know, it's going to be destructive testing if
6 we test it, and that is when I notified Mr. Sears about that.

7 And we didn't resolve that issue, and I
8 figured we would talk about it when we came to court as to
9 how that could be handled.

10 THE COURT: What is your position on having
11 Sorenson as a third party lab or the defense --

12 MR. BUTNER: I don't have a problem with that.
13 I figured we would work that out. The D.P.S. lab isn't the
14 be-all end-all for this kind of testing. Obviously, Sorenson
15 can do it, and I am sure that there are other fully
16 accredited labs.

17 MR. HAMMOND: If Sorenson would do it and
18 would allow someone from our lab to be present, that would be
19 fine with us.

20 MR. SEARS: And charge us \$250 an hour to copy
21 the report.

22 MR. HAMMOND: So quasi fine.

23 MR. BUTNER: Apparently, they are a
24 money-making outfit. I have to find out how this works.

25 THE COURT: That's what they do.

1 I will direct both sides work together,
2 then, and see if Sorenson or the defense lab will do it and
3 allow the representatives of whichever side is doing it, the
4 other side have a choice of labs to be present and
5 participate, if the D.P.S. crime lab won't allow someone else
6 in their lab. I guess understand that, given what they deal
7 with.

8 MR. HAMMOND: But I think when you are dealing
9 with accredited labs -- and our lab is certainly highly
10 accredited -- I think it's quite common, actually, for
11 laboratories to have other observers present. They do it in
12 their quality control process.

13 THE COURT: I think so, also.

14 MR. HAMMOND: So it should not be a problem.
15 I think it's more of a knee-jerk reaction.

16 MR. BUTNER: It isn't, with the D.P.S. lab, a
17 knee-jerk reaction. It's apparently a policy etched in
18 stone.

19 MR. HAMMOND: It's a knee-jerk policy.

20 I would like to go a whole day without
21 citing Todd Griffiths by name, but I stand by my knee-jerk
22 response.

23 And Judge, let me -- and the
24 biological --

25 THE COURT: As long as you have the "knee" in

1 there.

2 MR. HAMMOND: Well, let's be sure we do have
3 it. Life is long and the road is torture.

4 The other thing that has come up in this
5 process -- and I will be quick about it, if I can -- while we
6 were doing the evidence review, we discovered that there was
7 at least one other item, and maybe more, but at least one
8 other that was an obvious item to have been tested that
9 apparently has not been.

10 THE COURT: As far as can you tell.

11 MR. HAMMOND: I believe we have confirmed that
12 it has not been. It is a piece of molding that was at the
13 crime scene that I think you've seen in photographs and heard
14 witnesses talk about it. Is clearly -- to say it is covered
15 with biological evidence might be an understatement.

16 I now believe that the County will want
17 to test that, as well. And I think our suggestion is that as
18 close as we are to trial, if there is going to be additional
19 testing, we need to have some kind of an order that calls for
20 us to cooperate on these things, so that we can know what
21 additional things are being tested, who is doing it, how
22 quickly it's going to be done, whether there are going to be
23 other destruction issues. I wouldn't have foreseen it on the
24 shirt, and I don't foresee it here. I don't think it will be
25 destructive, but I think we ought to be working together on

1 these things that are coming up so late in the case.

2 THE COURT: Any objection, Mr. Butner, to a
3 standing order to communicate new testing to the other side,
4 if there is some new testing being done, and if it may use up
5 all of the materials in particular, so that there can be
6 consultation, presence of expert, if you are going through a
7 lab other than the D.P.S. lab, things like that?

8 MR. BUTNER: I think there is going to be more
9 than just those two items for testing. I will just tell you,
10 because I found out some other things that hadn't been
11 tested, and I am, like, "Why haven't those been tested? They
12 need to be tested."

13 THE COURT: Can you consult with them and
14 provide them with disclosure with what you are asking to be
15 tested, so that we can get a time line in place, if there is
16 going to be replicate testing, something like that?

17 MR. BUTNER: Sure.

18 THE COURT: I will so direct and order that
19 the State provide notice of what items are being tested. If
20 you have a Bates number, that goes along with that, a time
21 frame, what lab is doing the testing, what type of testing is
22 proposed, whether it is being done at a location for which
23 there can be cooperative presence by an expert from the other
24 side.

25 MR. BUTNER: What if I send stuff to the

1 D.P.S. lab, Judge? They just won't.

2 THE COURT: That will answer the question and
3 then -- but if you provide the information that you are
4 asking the D.P.S. lab to do it, then I think the other side
5 can ask that it be done by a different lab or to make some
6 proposals to you -- if the whole thing is going to be used
7 up. If it is not going to be used up and you can provide
8 capability of other type of testing, then --

9 MR. BUTNER: Okay. Good. That helps.
10 Because, I mean, there is that bunch of stuff I don't
11 think -- the testing that I understand is going to take place
12 is not going to use anything up. It was just that one item
13 that came up, and I am, like, "Oh, we need to advise the
14 defense about this."

15 MR. HAMMOND: It seems to me -- and we do
16 appreciate Mr. Butner advising us about it. But at this
17 stage of the case, I think it is not too much for us to ask
18 that we at least be provided promptly with a list of the
19 items that they intend to test, so that at least our experts
20 can help us look for issues with respect to those items.

21 THE COURT: That is ordered, and Mr. Butner
22 indicated his cooperation with that.

23 Any of the other ten items that you have
24 concern about?

25 MR. HAMMOND: I believe not, but let me make

1 one suggestion, since we are going to be together for several
2 more days.

3 I would like to double check with our
4 office. I believe the other items have been produced, but if
5 we could just have an understanding that -- we will check.
6 If there are any other items, we will talk to Mr. Butner
7 about it. If we can't resolve it, we will be back in touch
8 with you about it.

9 THE COURT: We'll revisit the issue sometime
10 later in the week. That is acceptable to me.

11 It is about noon. We will take a recess
12 at this point.

13 Did that cover everything down to
14 biological evidence?

15 MR. HAMMOND: I believe it does, Your Honor.

16 THE COURT: We still have at least another
17 couple or three matters for this afternoon.

18 I have a sentencing at one o'clock, so we
19 will start up at 1:30.

20 MR. SEARS: Thank you, Your Honor.

21 (Whereupon, a recess was taken at 11:51 to a.m.

22 to resume at 1:30 p.m. of the same day.)
23
24
25

NOVEMBER 17, 2009
1:28 P.M.

HEARING ON MOTIONS

APPEARANCES:

FOR THE STATE, MR. JOE BUTNER.

FOR THE DEFENDANT, MR. JOHN SEARS, MR. LARRY
HAMMOND, AND MS. ANN CHAPMAN.

THE COURT: The next item that I had on the
agenda -- the record can reflect the presence of the
defendant and his counsel and the prosecutor. The next item
I had on the agenda was a State's motion for taking physical
evidence in the form of handwriting. I think there was a
request for that on October 27 and a response objecting to
that on November 5th. I am not sure that I received a reply.

Mr. Butner.

MR. BUTNER: Judge, I don't think I filed a
reply. Well, I didn't know that. I guess we did file a
reply.

The long and the short of it is we just
got a bunch of handwritten notations on various documents,
and we have a diary and all kinds of things, and these are
notations on things that we think came from Mr. DeMocker out
of his lawyer's file, most specifically, and then also -- you
have already seen a bunch of the e-mails and so forth with
handwritten notes on them. And we need to get handwriting
exemplars, and we listed Mr. Hale as a witness so that we can

1 establish who made these notes on these various documents.

2 THE COURT: Authorship.

3 MR. BUTNER: Right. Authorship.

4 THE COURT: All right. Thank you.

5 Who is taking this one for the State --
6 or for the defense, Mr. Sears?

7 MR. SEARS: Judge, as we pointed out in our
8 response, just as a general proposition, particularly based
9 on my long experience with John Hale, often times what he
10 asks subjects to do goes beyond what we think the intent and
11 the plain language of the rule are and to have actually the
12 subject write out the questioned words, which implicates the
13 Fifth Amendment where handwriting would ordinarily not
14 implicate it, because it's not testimony. But if the
15 defendant is being asked to write out certain words which are
16 part of the State's case, there would be a problem.

17 But shortly after we got this motion, I
18 approached Mr. Butner and said that if there were, as he
19 says, a number of documents that had handwriting that they
20 thought might be Mr. DeMocker's, that I would be willing --
21 and am still willing -- to look at those documents, and
22 without waiving any other objections to foundation or
23 relevance or hearsay or any other basis for admitting it, we
24 might be in a position to stipulate that certain things were
25 written by Mr. DeMocker. And I am still willing to do that

1 in this case.

2 The only such document that Mr. Butner
3 has suggested to me was that retiring agent's agreement that
4 we heard about that had some writing on it, that Mr. Butner
5 thought might be Mr. DeMocker's. But I think rather than
6 spend funds to employ Mr. Hale, that is really what we are
7 talking about, is a finite set of documents with writing on
8 it that purports to be Mr. DeMocker's. We may be able to do
9 that.

10 And frankly, Mr. DeMocker may be in a
11 position to identify Carol Kennedy's handwriting, as well, if
12 that would be of assistance to the State. We don't have any
13 interest in obstructing things or delaying things. We are
14 just not inclined to volunteer Mr. DeMocker to the kind of
15 handwriting examination that I know Mr. Hale performs in case
16 after case. But if that is what the State is aiming at, I
17 think we can accommodate them.

18 THE COURT: Mr. Butner.

19 MR. BUTNER: I think it would be better if we
20 just got Mr. Hale to get the exemplars and have him analyze
21 the evidence that we want him to analyze. I asked Mr. Sears
22 about that one specific document, and he never did give me a
23 straight answer on that, and I don't want to have to go
24 through all of that. We are way down the road on this case,
25 as we all know.

1 And these things probably should have
2 been done quite some time ago. They weren't. Came to my
3 attention that they needed to be handled, and I think without
4 asking Mr. DeMocker questions about items of evidence and
5 without asking Mr. Sears to stipulate about items of
6 evidence, I think we ought to just get Mr. Hale on the job
7 and get these things accomplished, and move down the road.

8 THE COURT: I think there has to be a
9 substantial necessity for the -- showing a necessity for it,
10 so here's what I am going to do.

11 I'm going to authorize the taking of
12 physical evidence in the form of handwriting exemplars under
13 the direction of the State's expert, but first I want the two
14 of you to meet to see if you can enter a stipulation with
15 regard to any of the particular questioned documents that you
16 have. If you are unable to reach an agreed-upon stipulation
17 by December 1st, then I will authorize the taking of the
18 handwriting samples. I will sign it, but it's contingent on
19 your making a good faith effort on both sides to determine
20 what things really need identification authorship or not.

21 MR. SEARS: Your Honor, I am in the Verde
22 virtually every week to see Mr. DeMocker, and I could easily,
23 I think, arrange a time next week to do that. And if
24 Mr. Butner is around, he could -- or he could send me the
25 list, and I could take them into Mr. DeMocker and get him an

1 answer immediately on those.

2 MR. BUTNER: That's the situation, quite
3 frankly, Judge -- okay. First of all, we have three days
4 next week.

5 Secondly, I am in court pretty much,
6 probably all day at least two of those days, that I can
7 recollect. And it is just a real problem.

8 And thirdly, the evidence is over here in
9 Prescott. You know? So it's very difficult just
10 logistically.

11 I understand, and I will meet with
12 Mr. Sears and try and gather up all of the documents that
13 have handwriting on them, but I think the Court has already
14 seen a bunch of e-mails with handwriting on them from
15 probably Carol Kennedy -- I mean, that just seems logical --
16 and probably nobody else.

17 But, you know, that's the problem. So
18 Mr. Sears and I have got to meet someplace, and I guess I
19 have to get in my car when I get out of court, drive over to
20 Prescott, garner up this evidence, and then get together with
21 John Sears.

22 THE COURT: I think in terms that you all both
23 have the copies of the documents that you are talking about,
24 you can give him Bates numbers, he can -- I don't know to
25 what extent you are computerized with all of these, Mr. Sears

1 or not, but --

2 MR. SEARS: We have them in court, Your Honor.

3 THE COURT: -- I think they can be identified
4 by Bates number, and then Mr. Sears can then take those to
5 Mr. DeMocker as he proposes. If you all aren't able to reach
6 a resolution, that is why I put a short -- there I am with a
7 time line again, Mr. Butner, but --

8 MR. BUTNER: I understand, Judge.

9 THE COURT: -- I put a time line on it because
10 it is something that needs to be accomplished. But if you
11 don't have an agreement on all of the items that you have
12 questioned handwriting about, then after December 1st, you
13 can notice Mr. Sears on taking those samples.

14 MR. BUTNER: Okay. Thank you.

15 MR. SEARS: Your Honor, we had suggested in
16 our motion that alternatively if the Court were inclined to
17 order an exam, that we be provided the exemplars in advance,
18 and I would refine that in this way: that I would not give
19 them to Mr. DeMocker so that he could practice using the
20 exemplars.

21 But my concern, based on a long history
22 of Mr. Hale, having used him myself and been on the other
23 side of the cases where he worked for the State, is he has a
24 methodology that he applies, and I would want to know --
25 because the principle objection we have in the process is

1 that it almost always involves writing out questioned
2 sentences and phrases, which I think is a separate issue from
3 just making loops and swirls and S's and T's and things like
4 that.

5 THE COURT: Well, I disagree with you as
6 regards that. And so I am not limiting Mr. Hale on what
7 samples he takes.

8 MR. SEARS: I am fully expecting, Your Honor,
9 that we're -- if we are talking about handwriting on
10 documents that have already been disclosed, which I am sure
11 we are --

12 THE COURT: I hope you are.

13 MR. SEARS: Yeah. I am reasonably sure that
14 we can reach stipulations on those.

15 THE COURT: I share that reasonable
16 understanding, based on Mr. Butner and Mr. Hale, knowing
17 them, as well.

18 To the extent that you need any further
19 action by me or intervention by me, let me know. But given
20 the number of documents and such that we're talking about
21 replicating a fair portion of those in some fashion or other,
22 I'm probably still going to be available telephonically, if
23 you reach an impasse during the time frame.

24 MR. SEARS: Do we have some sense of how many
25 documents we are talking about?

1 THE COURT: Mr. Butner?

2 MR. BUTNER: I can't tell you offhand how many
3 documents we are talking about. There is a bunch involving
4 Carol Kennedy, I think, but I don't know how many in regard
5 to Mr. DeMocker. Probably not a whole bunch.

6 THE COURT: And I will leave it to the two of
7 you to discuss if you want Mr. DeMocker to identify anything
8 as Carol's handwriting. If Mr. Sears chooses to have him do
9 that, that is fine with me.

10 MR. SEARS: I think I may have said this, Your
11 Honor, but of course we would do all of this in entering the
12 stipulations without waiving any rights we have to attack the
13 admissibility of any particular document, whether it's been
14 identified as Mr. DeMocker's handwriting or not.

15 THE COURT: I guess I will cross that bridge
16 when we need to.

17 Anything else on the taking of physical
18 evidence?

19 MR. BUTNER: Nothing further from the State,
20 Judge. Thank you.

21 THE COURT: Defense?

22 MR. SEARS: No, Your Honor.

23 THE COURT: The next item that is on the list
24 that you provided, Mr. Sears, is the -- ties into the first
25 item from this morning, that is the victim's rights issues

1 rule made and statutory made.

2 MR. SEARS: Miss Chapman will be heard on
3 that, Your Honor.

4 THE COURT: Miss Chapman.

5 MS. CHAPMAN: Thank you.

6 Your Honor, we went through, I think,
7 four separate arguments that I know Mr. Dupont spoke to some
8 of them this morning, and I am going to take them in turn.

9 The first really addresses the limited
10 authority of the legislature with respect to their authority
11 to enact rules, to enforce the rights that are enumerated in
12 the Victim's Bill of Rights, and that is that the provisions
13 in 4431 and 4433(B) through (E) exceed the limited authority
14 that the Victim's Bill of Rights granted to the legislature.
15 And that is -- the authority granted to the legislature was
16 limited to rules that -- or laws that define, implement,
17 preserve, or protect the rights that are enumerated in the
18 Victim's Bill of Rights. And those rules that are listed and
19 provided for in (B) through (E) do not preserve, protect, or
20 implement the rights that are limited in the Bill of Rights.

21 And I won't -- I don't want to list them
22 for you, because I've listed them for you in the motion, but
23 specifically, a focus on the inability of defense to contact
24 victims and the inability, then, for victims to likewise
25 contact the defense, once they decide that they do want to be

1 interviewed. Survivors are not members of the prosecution
2 team. Their rights are not necessarily aligned. And the
3 Supreme Court has acknowledged the victims are not
4 represented by the prosecution or by the prosecutor.

5 The Victim's Bill of Rights, the
6 amendment to the Constitution does not provide that a victim
7 should not be contacted by defense counsel, nor does it
8 provide that a victim should not be free to meet with defense
9 counsel without the interference of the prosecution.

10 However, that is precisely what 4433(B) through (E) does --
11 it implements a system that prohibits the defense counsel or
12 anyone from the defense team from contacting a victim, and
13 even if a victim decides they do want to be interviewed, then
14 permits the prosecutor -- in fact, requires the prosecutor to
15 act as an interface between the victim and defense counsel.
16 That is beyond what is required by the Victim's Bill of
17 Rights and, in fact, violates the Victim's Bill of Rights.
18 And the argument is, and we think because of that, exceeds
19 the legislature's authority and ought to be struck down on
20 that ground.

21 As you know and as we mentioned this
22 morning, the Supreme Court has the authority to make the
23 Rules of Criminal Procedure, and when the legislature invades
24 the Supreme Court's authority, they don't have the authority
25 to do what they are doing, and that is what we have suggested

1 and believe that (B) through (E) of 4433 does.

2 With respect to the second argument,
3 which I think Mr. Dupont joined in and you had some
4 discussion with him about that this morning, the argument is
5 that both the Rule of Criminal Procedure 39(B)(11), which
6 prohibits the defense counsel from contacting the victim for
7 an interview, and the same provisions of 4433(B) through (E)
8 that we spoke about a moment ago, violate the rights that are
9 enumerated in the Victim's Bill of Rights. That is by
10 telling a victim -- once you decide that you want to have
11 direct contact with the defense counsel, you would have to
12 opt out of the Victim's Bill of Rights and the rights that
13 are enumerated there, that that violates the Victim's Bill of
14 Rights.

15 And that's -- I think this morning, when
16 it was referenced, Mr. Dupont acknowledged, and Your Honor
17 has seen the transcript, that both the judge at the initial
18 appearance and the prosecutor there read the law to require
19 that a victim opt out of the Victim's Bill of Rights if they
20 do want to have contact with the defendant. I read the law
21 that way, as well.

22 What it says is that a defense counsel
23 cannot have contact with a victim, and if the victim decides
24 that they want to be interviewed after that request is made,
25 the prosecutor shall communicate with the defense counsel.

1 So all communication between a defendant and a victim is
2 contemplated to run through the prosecutor.

3 That is not what the Victim's Bill of
4 Rights says. And, in fact, in this case, for the first many
5 months that Mr. DeMocker was incarcerated, his daughters were
6 prohibited from seeing him, and they did opt out of the
7 Victim's Bill of Rights, because that is what they thought
8 they were required to do and advised by both the Court and
9 the County Attorney at that initial appearance that that's
10 what they were required to do in order to have immediate
11 contact with their father.

12 The legislature does not have the
13 authority, either under the Victim's Bill of Rights or
14 anywhere else, to restrict the rights created by the people
15 through the Constitutional amendment. And the Supreme Court
16 has invalidated other provisions of the Victim's Rights Act
17 and Rule 39 when it conflicts with the Victim's Bill of
18 Rights. And in Roscoe, the Court invalidated a provision
19 that held up police officers or peace officers did not
20 qualify as victims. And the Court in that case said there is
21 plain language in the amendment that provides who qualifies
22 as a victim and who doesn't.

23 And I think when the legislature in this
24 case tried to narrow victims to those who don't want to have
25 contact with victims, they did precisely what they attempted

1 to do in eliminating peace officers as those who qualified.
2 And that is that they went beyond what the Victim's Bill of
3 Rights suggests is appropriate, and they tried to further
4 narrow the category of people who qualified as victims to
5 those who agree with the prosecution or those who don't want
6 to have contact with defense counsel. That is in direct
7 contradiction to what the Victim's Bill of rights provides,
8 which is that victims -- all victims, including those that
9 want contact with defense counsel -- are entitled to be
10 treated with dignity, and fairness, and respect. And these
11 provisions prohibit that from happening. That's what
12 happened to Mr. DeMocker's daughters here.

13 Your Honor, the next argument applies to
14 the same --

15 THE COURT: Before we leave that argument,
16 what are you saying happened here, that they were not treated
17 with fairness, respect and dignity? I mean, clarify what
18 your last comment meant.

19 MS. CHAPMAN: Sure. I am saying that because
20 they were required to opt out, which is what I think 4433(B)
21 through (E) and Rule 39(B)(11) contemplates, because they
22 wanted contact with their father, they were required to opt
23 out. I don't think that's treating them with dignity,
24 fairness and respect. And I think that -- the legislature's
25 rules say if you want to have direct contact with the defense

1 team, you are not going to get all these other rights, under
2 the Victim's Bill of Rights.

3 THE COURT: Thank you. Go ahead.

4 MS. CHAPMAN: I think the next argument, Your
5 Honor, is with respect to Mr. DeMocker's rights. Under the
6 Sixth Amendment and due process, which require counsel to
7 fully prepare and investigate his case and also requires
8 us -- the Rule 6.8 requires us to be guided by the ABA
9 guidelines. The ABA guidelines require us -- we have an
10 obligation to interview witnesses and also to interview
11 potential victim witnesses.

12 Ruth Kennedy, Carol Kennedy's mom, and
13 John Kennedy, Carol Kennedy's brother are both victims in
14 this case and they're also witnesses in this case. The rule
15 here would prohibit us to have any contact with them because
16 they are victims in this case. We would like to have an
17 opportunity to reach out to them. And we've explained to you
18 in this pleading and in others, in an affidavit filed by
19 Dick Burr, the process of defense-based victim outreach.
20 These rules, again, prohibit us from fulfilling our
21 obligations under the due process clause and violate
22 Mr. DeMocker's Sixth Amendment rights by prohibiting our
23 ability to do that.

24 And lastly, your Honor, the State did not
25 respond to this argument, but I think there is a First and

1 Fourteenth Amendment, and under the Arizona Constitution,
2 Article 2, Section 4 and 6, First Amendment right here, that
3 we don't have the right, under these provisions -- and
4 that's, again, (B) through (E) of 4433 and Rule 39(B)(11), to
5 have contact with the victim.

6 It prohibits the rule -- 4433(B) says we
7 can only have contact with the victim through the
8 prosecutor's office. And (B)(11) provides that all requests
9 shall be communicated through the prosecutor, and that the
10 victim's response shall also be communicated through the
11 prosecutor. So the communication both directions is
12 controlled by the rule and also by the statute.

13 I won't go through the arguments in
14 detail, because I think they are laid out in the pleadings.
15 But essentially, the arguments are that they're overbroad and
16 there is extensive case law that is cited in the brief about
17 if you are going to prohibit a protected category of speech,
18 you have to do it in the narrowest way possible. The provisions
19 here assume that all contact with a defense team is harmful
20 to a victim. And I cited you to the Federal Crime Victim's
21 Rights Act of 2004. That protection enumerates many of the
22 same rights that the Arizona Bill of Rights enumerates but
23 does not prohibit such contact.

24 There are more narrowly chartered ways to
25 protect the dignity and respect of victims than the Victim's

1 Bill of Rights does, without broadly prohibiting all contact
2 between the defense team and the victim. And for those
3 reasons, we think these provisions ought to be struck down.

4 THE COURT: In point of fact, you have two
5 separate categories of victims in this particular case. You
6 have the members of the Kennedy -- the immediate -- Miss
7 Kennedy's mother and brother. Let's put it that way. The
8 daughters are no less immediate family than Miss Kennedy's
9 mother. So my beginning to choose that word wasn't correct.

10 But you have the daughters who want
11 contact, who want to speak to you, who have been speaking to
12 your side of the case, and you have the mother and brother
13 who haven't given any indication that they want any
14 exceptions made to the rights that they have under the
15 statutes under the rules or under the Victim's Bill of Rights
16 directly. Agreed?

17 MS. CHAPMAN: Well, I agree that Miss Kennedy,
18 as far as we know, hasn't expressed any interest in doing
19 anything different on the Victim's Bill of Rights.

20 But what I will say is that we haven't
21 been able to, because of the law, engage in any
22 defense-initiated victim outreach, and we think that's a
23 violation of our right and our duty under the ABA guidelines
24 and any other --

25 THE COURT: Are ABA guidelines

1 Constitutionally provided? Has the Supreme Court adopted
2 those on an equivalent basis to the Victim's Bill of Rights
3 in the Arizona Constitution -- and the Arizona Supreme Court?

4 MS. CHAPMAN: Rule 6.8 of the Arizona Rules of
5 Criminal Procedure require counsel in a capital case to be
6 guided by a knowledge of the allowable ABA guidelines. So I
7 think to the extent that we're being guided by those
8 guidelines, and to the extent that those guidelines require
9 us to interview witnesses and to reach out to victims'
10 families, that is what we are required to do. That is what
11 we are trying to do.

12 And I don't think that is the only way in
13 which these rules violate the constitutional provisions. If
14 you look at what the legislature has the authority to do, in
15 terms of what they are doing to protect victims and their
16 authority to create rules within the criminal system,
17 prohibiting defense counsel contact is not what they have the
18 authority to do. That's not what the Victim's Bill of Rights
19 requires.

20 THE COURT: The only part of this case where
21 it has that impact, though, wouldn't you agree, is on the
22 Kennedy part of the group. It's not -- it's on Carol
23 Kennedy's mother and brother; it's not on -- as far as the
24 girls are concerned. The girls have been dealing with you
25 without -- with exception since at least the point in time

1 where they understood that they had waived certain
2 protections of the Victim's Bill of Rights statutes or rules.

3 MS. CHAPMAN: That's true, Your Honor. The
4 only thing I would add to that is that that is precisely why
5 this is a problem.

6 The girls believed -- and I believed that
7 they were correct, as I had mentioned -- the Court believed
8 and the prosecutor believed they were required to forgo
9 their rights under these rules to have contact with us. So
10 yes, they've been having contact with us, but for however
11 many months they were not receiving the benefits that are
12 enumerated and they are required to receive under the Arizona
13 Constitution.

14 So while they have been having contact
15 with us, they've been doing so at the cost of their rights.

16 THE COURT: The only one I am aware of is
17 the -- I guess they misunderstood that they didn't have any
18 right to make any allocution about their position as regards
19 release.

20 MS. CHAPMAN: They have a right to confer with
21 the prosecution. They have a right to receive information.
22 They have --

23 THE COURT: The prosecution since reached out
24 to them by what Mr. Butner told me.

25 MS. CHAPMAN: I believe that happened, but

1 not -- I mean, it wasn't immediate, Your Honor. And I would
2 have to go back to look at the date that the letter was sent
3 to Mr. Kottke. And I know that they don't feel like the
4 information has been free-flowing from that office.

5 And I want to let Mr. Dupont speak for
6 what happened with them, because I haven't had contact with
7 them in great detail about their relationship. But what I do
8 know is they were required to opt out, and they are entitled
9 to certain rights under the Victim's Bill of Rights. And
10 they were told by the prosecutor and by the judge at the
11 initial appearance that that is what they were required to do
12 to have contact with their father. I think that is what the
13 statute says, and I think that's a violation of the Victim's
14 Bill of Rights.

15 THE COURT: Thank you.

16 Mr. Butner.

17 MR. BUTNER: Judge, there was a mistake made
18 by the Justice of the Peace and the prosecutor at -- I
19 believe it was that initial appearance on October 23rd of
20 2008 when the release conditions were established for
21 Mr. DeMocker. But the girls weren't even present at that
22 point in time. And when I say "the girls," I mean Charlott
23 and Katherine DeMocker.

24 Thereafter, they were contacted by
25 Victim's Services, and they indicated that they thought they

1 had to opt out. And when I say "they," I mean Charlott and
2 Katie DeMocker -- Charlott and Katherine indicated to
3 Victim's Services that they felt they had to opt out of
4 contact with their father, and they indicated they wanted to
5 have contact with their father.

6 Part of the reason that I wanted those
7 communications filed as part of my response was so that the
8 Court could see that right from the beginning Victim's
9 Services was telling them "No, you don't have to opt out of
10 Victim's Services to have contact with your father. That has
11 nothing to do with Victim's Services, so to speak. That's a
12 release condition that needs to be changed by the judge for
13 you to have contact."

14 And on November 17 of 2008 -- not months
15 after this initial appearance, but less than a month, and
16 even that delay was occasioned as a result of two notices of
17 changes of judge. On November 17, 2008, those release
18 conditions were changed so that they could have contact with
19 their father. They were still told consistently by Victim's
20 Services that that wasn't necessary for them to opt out in
21 order to have contact with their father.

22 I don't think the defense has standing to
23 argue the Constitutionality of this statute. But secondly, I
24 think they are incorrect in the way that they characterized
25 the statute. The Victim's Bill of Rights, the Constitutional

1 changes, and then the statutes and rules that were
2 promulgated to further those Constitutional changes were done
3 to protect victims.

4 This is a different sort of a case. We
5 have victims that have opted in, so to speak, and have wanted
6 to be protected. And what are those protections from? Well,
7 they are being protected from not being interviewed by the
8 defense, unless they choose to do so, not having contact with
9 the defense, unless they choose to do so, and then that is
10 through the County Attorney's Office.

11 Obviously, throughout this case, except
12 for that first about three weeks, Katherine and Charlott
13 DeMocker have had on-going contact with the defense and
14 on-going contact with their father.

15 I have spoken with Ruth Kennedy and John
16 Kennedy. They haven't wanted to make any changes in regard
17 to the protections that they are entitled to under the
18 Constitution and statutory scheme for Victim's Rights. Ruth
19 Kennedy informed me that she was even present at a meeting
20 where Mr. Sears met with the family and talked about how they
21 were handling the case and things of that nature.

22 And I am not pounding the table that,
23 "Oh, Mr. Sears communicated improperly with Ruth Kennedy." I
24 don't think he did, and she was there because she wanted to
25 be there.

1 I don't think this statute is
2 unconstitutional. I don't think it is unconstitutional as
3 applied in this case, and I don't think that the defense has
4 standing to argue it. The issue basically was release
5 conditions, as set by the initial-appearance court.

6 This whole argument strikes me as being
7 based upon false premises and concocted from the outset. I
8 have reached out as the prosecutor to have contact with these
9 victims and been somewhat frustrated in that regard for, I
10 guess, various circumstances. I am not sure exactly what
11 they all are. I just haven't been able to have contact with
12 victims Katherine and Charlott DeMocker, despite the fact
13 that they had, at one point at least -- Katherine had an
14 attorney representing her.

15 So I would just ask that the motion be
16 denied.

17 THE COURT: Opting out. Where is that
18 provided for, specifically in the --

19 MR. BUTNER: In the statutory scheme?

20 THE COURT: -- statutory scheme?

21 MR. BUTNER: You know, I don't see that even
22 mentioned in the statutes, and maybe I am missing something.
23 It's just sort of evolved, as I understand it, as a way of
24 doing business with the Victim's Services Division.
25 Where -- the typical case -- and this is not a typical

1 case -- but the typical case, the police officer is at the
2 scene and arrests somebody, and the victim is there, and they
3 fill out some paperwork right at the scene where the victim
4 is given their victim's rights, so to speak. It is a sheet
5 that spells them out, and then they can make a decision at
6 that point in time whether they wish to be involved in
7 Victim's Services or whether they wish to opt out. And I
8 think that is where this comes from.

9 In this particular case --

10 THE COURT: Can you answer that?

11 MS. CHAPMAN: 4417 requires the victim to
12 provide and maintain a form with their information on it. If
13 they want to receive an update and notice, then that is
14 really the only provision that, as I see it, contemplates
15 that the victim is required to give information that they
16 want to receive notice.

17 THE COURT: So either in the Bill of Rights,
18 the rule or the statutes, there isn't a, quote, "opt out."

19 MS. CHAPMAN: No. And my understanding is
20 that Mr. Butner is exactly right, it's sort of a way to get
21 around how everyone, I think, reads the rule, which is
22 that -- I think that -- you know, I don't think that the
23 prosecutor and the judge at that initial appearance were
24 confused. I think the rule says if there is going to be
25 direct contact -- that basically, there can't be direct

1 contact, that the person has to opt out. Because the rule
2 says the defense can't contact the victim, and once the
3 victim says they want to have an interview, the prosecutor
4 communicates that. So I think that's the system that is
5 built up.

6 THE COURT: But it's not provided
7 specifically.

8 MS. CHAPMAN: No. Only 4417.

9 THE COURT: I promise to come back to you. I
10 will let Mr. Butner finish.

11 MR. BUTNER: Judge, I understand what she is
12 saying, and it is half right. But I have several cases
13 presently going full steam where the victims have contacted
14 the defense attorneys -- this is one of them, okay? -- and
15 had nothing to do with me. Okay? And in fact, I think one
16 of them -- they are opted in, so to speak. Okay? They still
17 have decided to exercise their victim's rights. But they
18 also decided that they wanted to contact the defense
19 attorneys, and they have done that and provided an interview
20 with the defense attorney, in one case, which they were kind
21 enough to then provide to me.

22 But the point being that we are not
23 controlling what victims do. What we are doing is attempting
24 to protect them, and that's the purpose for this statutory
25 scheme, to sort of equalize the balance of rights between the

1 defendant and the victim, and to make sure that if victims do
2 not want to be contacted by defense counsel and do not want
3 to be interviewed, that they can say, "Hey, I don't want
4 that. Don't bother me."

5 THE COURT: All right. Thank you.

6 Miss Chapman.

7 MS. CHAPMAN: Just to address what Mr. Butner
8 just said, I am not quibbling with the fact that there may be
9 cases where exceptions exist. I'm just saying this is what
10 the law says. This is what 4433 and Rule 39 say. And is
11 this constitutional? Did the legislature have the authority
12 to do what it did, and does the law and rule comply with what
13 the Victim's Rights says?

14 Remember, part of our argument is about
15 what this law's effect was on Katie and Charlott DeMocker for
16 the first couple of months of this case. But the other part
17 of the motion is what is the law's effect on Ruth Kennedy's
18 and John Kennedy's opting in to the 4433 provisions. And the
19 effect of that is that we are not able to reach out to them
20 and try to initiate contact.

21 Now, Mr. Butner's response is "Well, we
22 are trying to protect them and their right to refuse an
23 interview." And it's absolutely correct, and we are not
24 arguing right now about their ability to refuse an interview,
25 because the Victim's Bill of Rights says they do have a right

1 to refuse an interview. But that's not what we're talking
2 about right now.

3 What we're talking about right now is:
4 Do we have a right to initiate contact with them directly?
5 And the Victim's Bill of Rights does not address that.

6 4433 does. It goes beyond what the
7 Victim's Bill of Rights requires. It doesn't define,
8 implement, or protect those rights. It prohibits contact.
9 That directly affects our First Amendment rights; it directly
10 affects our ability to investigate and prepare this case, our
11 obligations under the ABA guidelines. And in some cases, as
12 with Charlott and Katie DeMocker, it affects their rights and
13 what they want to do as protected under the Victim's Bill of
14 Rights -- that is, those other rights of respect and dignity.

15 What we're talking about is
16 Mr. DeMocker's defense team's right, our right to reach out
17 to Ruth Kennedy and John Kennedy, and request some kind of
18 contact. That is what we are talking about with this motion.
19 And the legislature went well beyond what the Victim's Bill
20 of Rights says.

21 By reaching out to them, we are not
22 affecting their rights to be treated with fairness, dignity,
23 and respect. All of those rights must be respected, and
24 that's provided for in other criminal rules, the way that we
25 approach them.

1 But what is not provided for in the
2 Victim's Bill of Rights, but what is in this law and this
3 provision that we're saying is unconstitutional, both because
4 of the legislature's authority and because it exceeds what
5 the Victim's Bill of Rights says, is our ability to reach out
6 and initiate contact with them. And I think --

7 THE COURT: Well, isn't that what the rule --
8 the rule also provides for the contact to go through the
9 prosecutor's office; right? So if Rule 39 provides for
10 that -- it kind of pokes a hole in your jurisdictional
11 argument about the legislature's proscribed from doing that
12 if the Supreme Court is doing that, as well.

13 MS. CHAPMAN: Right. I mean -- well, what
14 we're saying is that the legislature exceeded authority under
15 the Victim's Bill of Rights. The Supreme Court adopted,
16 whole cloth -- what the Supreme Court rule says is you can't
17 ask a victim for an interview. So it's a little more limited
18 than what 4433 says. But in both cases, we think it exceeds
19 what the Victim's Bill of Rights proscribes.

20 THE COURT: What I was referring to is Rule
21 39, Subsection --

22 MS. CHAPMAN: (B)(11).

23 THE COURT: -- (B)(11). It's broader than
24 that. It says, "After charges are filed, defense-initiated
25 request to interview the victim shall be communicated to the

1 victim through the prosecutor."

2 MR. CHAPMAN: Right. So that's a request for
3 an interview.

4 Rule 4433 (B) is slightly broader. It
5 says any contact.

6 So again, 39(B)(11) is limited to an
7 interview; and 4433(B) is any contact. So it is slightly
8 broader. But in both cases we believe that both provisions
9 are violative of the First Amendment and violative of the
10 Victim's Bill of Rights. And we believe that 4433 was
11 exceeding the legislature's limited authority under the
12 Victim's Bill of Rights.

13 So the rule is slightly more narrow than
14 4433(B). And again, we think they are both violative.

15 I just want to be clear that the Victim's
16 Bill of Rights does say a victim doesn't have to submit to an
17 interview. And right now, for purposes of this motion, we
18 are not quibbling with that.

19 What we are quibbling with is our ability
20 to approach a victim and conduct outreach. And we described
21 for you what defense based victim outreach is in both Dick
22 Burr's affidavit and elsewhere. And that is what we are
23 being prohibited from doing here. It doesn't address that a
24 victim has all the other rights under the Victim's Bill of
25 Rights, but that is what we are prohibited from doing here.

1 THE COURT: Mr. Butner.

2 MR. BUTNER: Judge, I just draw your attention
3 to the Constitutional provisions, and it is obviously Article
4 2.1, Victim's Bill of Rights. Under (A)(5), talks about,
5 quote, "To refuse an interview, deposition, or other
6 discovery request by the defendant, the defendant's attorney
7 or other person acting on behalf of the defendant."

8 And then going down, under No. 11, quote,
9 "To have all rules governing criminal procedure and the
10 admissibility of evidence in all criminal proceedings,
11 protect victim's rights, and to have these rules be subject
12 to amendment or appeal by the legislature, to ensure the
13 protection of these rights."

14 Clearly, I think that the constitutional
15 provision indicates that those rights should be protected,
16 and the legislature should take such steps as are necessary
17 in order to protect them.

18 MS. CHAPMAN: And I would just direct Your
19 Honor to the citation in our motion to Shumway, which said
20 that to survive constitutional scrutiny, the statutory
21 enactment of the Victim's Bill of Rights must be limited to
22 rights created in the statute, because otherwise it would
23 violate the Separation of Powers Doctrine in the Arizona
24 Constitution, which provides that the Supreme Court enacts
25 Rules of Criminal Procedure.

1 THE COURT: Thank you.

2 Obviously, the first reference is to the
3 Constitution and the Victim's Bill of Rights, particularly.
4 The purpose of the Victim's Bill of Rights to preserve and
5 protect the victim's rights, justice and due process. And
6 they set forth in Subsection (A) the various rights, the
7 first one of which is to be treated with fairness, respect,
8 and dignity, and to be free from intimidation, harassment, or
9 abuse throughout the criminal justice process.

10 There are, then, following that general
11 statement some specifics about rights with regard to release
12 or notification upon escape, to be present, and upon request
13 to be informed of all criminal proceedings where the
14 defendant has a right to be present, and to be heard at any
15 proceedings involving post-arrest release decisions, which is
16 where I think the Justice of the Peace fell down in terms of
17 the advice and where apparently there was some
18 misunderstanding, at least as far as my position was
19 concerned with regard to that up until fairly recently, but
20 also to be heard with regard to the negotiated plea and
21 sentencing.

22 The proscriptions on contact and the
23 Victim's Bill of Rights are not stated in that fashion. They
24 are stated in Subsection 5 as "To refuse an interview,
25 deposition, or other discovery request by the defendant, the

1 defendant's attorney or other person acting on behalf of the
2 defendant," presumably referring to things like
3 investigators. Rights to confer with the prosecution, to
4 read presentence reports, to receive restitution promptly, to
5 be heard at post-conviction proceedings, to a speedy trial or
6 disposition and prompt and final conclusion of the case after
7 conviction and sentencing, and importantly, to be informed of
8 Victim's Constitutional rights.

9 Mr. Butner is correct that there are some
10 references in Subsection (D) and in Subsection (A)(11), that
11 refer to the subject of amendment or passing of legislation,
12 initiative or referendum to enact the substantive or
13 procedural laws to define, implement, preserve and protect
14 the rights guaranteed to the victims by this part of the
15 Arizona Constitution.

16 Then there is something relatively akin
17 to Amendment Ten of the Bill of Rights of the United States
18 Constitution, Subsection (E). The implementation of Victim's
19 Rights was, if I recall correctly, first done through rule of
20 the Supreme Court through the Criminal Procedure Rule 39, and
21 I will grant that that is broad, in the sense that it refers
22 to some restrictions on defense counsel's contact with
23 victims.

24 I don't find the First Amendment or
25 Fourteenth Amendment violations in that, however. And

1 frankly, I don't find that the statutory implementation
2 language violates the Constitution.

3 So I am going to deny the motion
4 specifically for the Court to declare 13-4431 and/or 4433(B)
5 through (E), and specifically Rule 39(B)(11) as
6 unconstitutional.

7 Frankly, in this case, the -- to the
8 extent that it has impacted the defendant, and the impact is
9 with reference to the brother and mother and not, in my
10 opinion, with regard to the contacts between the daughters of
11 Mr. DeMocker and Mr. DeMocker's counsel, my observation is,
12 and maybe it is a result of the misadvice that I think they
13 were given at the time of the initial appearance, that they
14 would have to waive all victim's rights. I don't think that
15 the Constitutional provision or the statutes -- which is why
16 I asked that question. I don't think that there is anything
17 in the rules or the statutes or the Victim's Bill of Rights
18 itself that sets forth exactly how a victim opts in or opts
19 out or loses, other than being in custody, their
20 constitutional rights under the Victim's Bill of Rights.

21 And I think that rather than broadly
22 declaring the statutes unconstitutional, that they can be
23 read in a fashion that upholds their constitutionality, in
24 the way in which the Court has read it, in allowing
25 Mr. Dupont and his clients to have a word with the Court

1 about the issue of release is appropriate.

2 I think -- I don't think that -- I do
3 think this: that the victims have a broad capability of
4 asserting what rights they wish to assert under the Victim's
5 Bill of Rights and to waive what rights they wish to waive.
6 It seems to me their rights, much as the rights of a
7 defendant, can be waived knowingly, intelligently, and
8 voluntarily. So can Victim's Bill of Rights rights be
9 waived, in terms of having contact from a defendant who is
10 accused in the case, having contact with his or her counsel.
11 I think that those rights, like other rights, can be waived
12 and, on the other hand, can be asserted. And it's up to the
13 victim to assert or to waive.

14 But I don't find that the statutory
15 implementation, as authorized under the Victim's Bill of
16 Rights itself, represents an unconstitutional invasion of the
17 judicial department prerogatives in connection with making
18 rules for proceedings in the criminal sector.

19 So for those reasons, I am going to deny
20 the motion to declare those sections or sections of rules
21 unconstitutional.

22 I have next on the list the defense
23 motion for finding of probable cause on the aggravators, a
24 Chronis hearing.

25 I have next after that a defense motion

1 to suppress evidence, a Franks hearing, which I understood
2 was meant for tomorrow.

3 Are there other motions that you are
4 interested in having me take up today, such as the defense
5 motion to compel Sprint and Verizon, which is what was filed
6 November 12?

7 MR. SEARS: We have seen your signed orders on
8 both of those motions, Your Honor, and we are getting ready
9 to comply and re-service Sprint and Verizon with that and
10 another copy of the motion.

11 THE COURT: I didn't want, honestly, to wait
12 for the response of the State with regard to that. I think
13 we need to move on that.

14 MR. SEARS: Thank you, Your Honor.

15 THE COURT: Without offense intended.

16 MR. BUTNER: No offense taken, Judge.

17 THE COURT: I expected that was the case. It
18 was more lack of cooperation from a third party than it was
19 the State's --

20 MR. BUTNER: I understand.

21 MR. SEARS: Judge, it's not a motion, but
22 there is one scheduling matter related to our hearing on
23 December 15 dealing with jury issues. When we got you to pry
24 some time loose on your calendar to set that, you squeezed
25 out an hour and a half for us that day. And we were hoping

1 that the earth had moved and you had some more time either
2 that day or close thereto, because we have done a
3 considerable amount of work getting ready for that, and we
4 think that all the parties and the Court would benefit from a
5 bit more time to consider the number of issues that we have
6 teed up for discussion.

7 THE COURT: I am not sure about that week. I
8 think I have a trial that is currently scheduled to commence
9 the 16th. I guess I don't know if it is going to go or not
10 at this point. I do have, I think, some time available the
11 week before, if you wanted to start on it earlier than the
12 15th.

13 MR. SEARS: Sure.

14 THE COURT: The --

15 MR. SEARS: I know I am out of state. I will
16 be back the 9th. I am going that Monday and Tuesday, which I
17 think is the 7th and 8th.

18 THE COURT: I think Wednesday the 9th I have
19 time available, if you are able to do that.

20 MR. SEARS: I'm sure I have.

21 THE COURT: Mr. Butner, are there other issues
22 that you wanted to discuss today, other than maybe some
23 general discussion, and I don't know if you need to have that
24 in open court or if you wanted to -- you and Mr. Sears and
25 Mr. Hammond wanted to discuss the Chronis hearing at this

1 point, as distinguished from on Thursday?

2 MR. BUTNER: I don't have any other issues to
3 discuss, Judge. I am not sure I even want to discuss the
4 Chronis hearing anywhere else. But if compelled, of course,
5 I will be there.

6 MR. SEARS: We ask for an order compelling
7 Mr. Butner's attendance, Your Honor.

8 THE COURT: Anything else that you think I
9 needed to take up before the 15th or before the 9th or before
10 tomorrow?

11 MR. SEARS: We have an e-mail from Deb from
12 here, who says that they contacted -- she contacted Sorenson,
13 whose response is -- Sorenson is saying this: "We charge
14 \$250 per hour. This request should be under two hours;
15 therefore, the cost should not be more than \$500."

16 THE COURT: That's gracious of them.

17 MR. SEARS: "Let me know if you need
18 additional help with this."

19 So that is the current state of where we
20 are with Sorenson Lab.

21 I think this relates to the protocols;
22 right?

23 MS. CHAPMAN: It was not only the protocols
24 but the other eight items on the original list.

25 MR. SEARS: All the other things we asked for

1 that we are still waiting to hear.

2 THE COURT: I would like some better
3 explanation from them about what exactly they think we are
4 getting for the \$500 -- "we" in the grand sense.

5 MR. SEARS: That would about cover a plane
6 ticket for Mr. Butner to fly to Salt Lake and pick it up
7 himself and come right back.

8 MR. BUTNER: Bring it back.

9 THE COURT: I could be persuaded to do that
10 myself.

11 MR. BUTNER: I could, your Honor, if they have
12 enough snow in the Wasatches.

13 MR. SEARS: During ski season.

14 MR. BUTNER: That's right.

15 THE COURT: Well, I still would like to know
16 what --

17 MR. BUTNER: We will inquire, Judge,
18 absolutely.

19 THE COURT: -- what they're asking that much
20 money for, if it's simply a downloading process onto a disk
21 or even somebody standing at a Xerox machine making copies.
22 If you would please inquire.

23 Anything else today, then, Mr. Sears?

24 MR. SEARS: I don't believe -- if we could
25 have some time with you in chambers, we waive

1 Mr. DeMocker's presence so the jail can take him back.

2 THE COURT: We can do that. So I will
3 adjourn, then, at this point. If you need to clean up the
4 desk and check availability for November then let me know. I
5 will try to find out what is still available on November 9.
6 I think pretty much maybe the whole day is -- maybe a couple
7 of little hearings set.

8 MR. SEARS: Maybe December 9?

9 THE COURT: Thank you. December 9. And see
10 if I can plug you in to some more time there.

11 MR. SEARS: And nine o'clock in the morning to
12 resume tomorrow?

13 THE COURT: The nine o'clock is to resume,
14 then, the Franks issues.

15 MR. SEARS: Suppression and Franks.

16 THE COURT: Okay. We will take a recess and
17 go off record.

18 You don't need our discussions on record,
19 or do you?

20 MR. SEARS: I'm afraid I think we do need to
21 have them on the record.

22 THE COURT: Then I will have the court
23 reporter and court clerk in chambers, also. I'll just leave
24 things here for now.

25 MR. BUTNER: Judge, before we go off record, I

1 grabbed my calendar to see if I -- because it struck me that
2 December 9 is a bad day for Joe, and it is at -- at this
3 moment, I have a trial that is scheduled to start that day.
4 But I had been given some information that maybe that trial
5 was not going to go, by defense counsel. That was going to
6 be resolved in my absence in court this morning, I think, so
7 I will try to find out.

8 THE COURT: Make a phone call. Take a
9 ten-minute recess or so, and I'll let you all take a brief
10 rest here.

11 (Brief recess.)

12 THE COURT: We are on the record, but
13 Mr. DeMocker has left, as everyone except the three lawyers
14 for the defense team and Mr. Butner and his paralegal and my
15 staff.

16 Mr. Sears.

17 MR. SEARS: Judge, of course, we waive
18 Mr. DeMocker's presence, for the record, here, as we said we
19 would.

20 As we get ready to move forward here on
21 Thursday with our expert witness, we were hoping to have a
22 minute to chat with and you Mr. Butner about the state of the
23 Chronis issues at this point. We are not proposing that we
24 argue these motions or do much. Just see if there was
25 something we could talk about that might give everyone

1 concerned a little more guidance and direction about where we
2 were going.

3 One of the things we did in the last day
4 or so was to pull out a few of the cases on F-6 that we
5 talked about and had extra copies made.

6 THE COURT: Okay.

7 MR. SEARS: And I have them.

8 It's State vs. Murdaugh, M-u-r-d-a-u-g-h,
9 that we talked about

10 State vs. Newell, N-e-w-e-l-l, an Arizona
11 Supreme Court case.

12 Gretzler, a 1983 Supreme Court case.

13 And Anderson, a 2005 Arizona Supreme
14 Court case.

15 And I have copies for the Court and
16 Mr. Butner, because I think these are the cases, particularly
17 Murdaugh and Anderson, that we have talked about a great
18 deal, and I expect when we get around to the end of the
19 Chronis hearing and some sort of argument, we will talk about
20 them some more.

21 THE COURT: The State's memorandum didn't give
22 me any indication that they were going to withdraw No. 6 or
23 necessarily any of the other ones.

24 Is that a right read, Mr. Butner?

25 MR. BUTNER: That's a right read, Judge. But

1 you also probably took note that we did not vigorously argue
2 a couple of those. Right. So I am sure that the Court will
3 make a judicious decision.

4 MR. SEARS: And that's better than nothing.
5 As Judge Kiger says, it's more than a little and less than a
6 lot.

7 Because I was kind of hoping it has
8 something to do with how we would use our time on Thursday.
9 And particularly, we are bringing up Mr. Curry, who is our
10 forensic financial expert, to talk in detail about his work
11 and also his assessment of the work and testimony of
12 Mr. Echols in this case. And to the extent that the State
13 is -- I don't know how to put this gently -- if the State is
14 not vigorously pursuing the -- what we call the
15 witness-killing aggravator, Mr. Curry would otherwise be
16 prepared --

17 THE COURT: No. 12.

18 MR. SEARS: That's right.

19 Mr. Curry would be prepared to testify at
20 length about his analysis of the e-mails, Exhibit 138, and
21 other materials that he has been provided to talk about that.

22 If we knew that the State was just going
23 to rest on what is presented so far and we had some
24 indication from the Court where we were heading, we might be
25 able to foreshorten that part of Mr. Curry's testimony

1 greatly.

2 THE COURT: So without deciding it, I will
3 tell you I have -- I am having real trouble with F-12 and
4 F-13. I am kind of open-minded on the rest.

5 F-2, to some extent, has had a grand jury
6 determination, and maybe that is still there.

7 The pecuniary gain, I've already
8 expressed some opinions about that, and at a certain point in
9 time recognizing the difference between the Simpson hearing
10 and a Chronis hearing.

11 And the F-6 has had some clarification.
12 I guess I hear what you are saying, but I am not sure that I
13 am there, yet, Mr. Sears.

14 MR. SEARS: I understand.

15 THE COURT: Is that at all helpful?

16 MR. SEARS: It is.

17 THE COURT: It's more than a little, it's less
18 than a lot.

19 MR. SEARS: It is, yes. Where have I heard
20 that?

21 I don't know if you were -- we have, of
22 course, obtained transcripts, now, of all of the testimony of
23 all of the witnesses, which we would be happy to share back
24 with the Court, if you don't have access to that. And
25 particularly, we now have the benefit of looking at the

1 State's bench memo overnight and have gone back and looked at
2 parts of the record that we can identify.

3 But if you had those transcripts and were
4 going to look at parts of it, I can more easily make
5 reference to them than copying those parts and giving them to
6 you and then facing the inevitable request from Mr. Butner
7 that we give him more than I copied.

8 THE COURT: Who has what? Do you both have
9 transcripts of all of the --

10 MR. BUTNER: Judge, I don't think that we have
11 complete transcripts, and I haven't been able to make sure.

12 THE COURT: If you want to make references to
13 the transcript, I don't think I have them yet, but Roxanne
14 indicated to me that if I wanted her to make copies for me,
15 that she would simply do that, if you think it is easier to
16 handle it in that way, and just make transcriptional
17 references. I think that is probably the soundest way of
18 doing it.

19 MR. SEARS: I don't know if we are going to
20 have more than a dozen or so different places that we would
21 want to point you back to what we think the witness has
22 actually said as opposed to what the State said they said.

23 THE COURT: Is it particularly when you have
24 your guy on that you want me to have access to the
25 transcripts, and Mr. Butner to have access to the transcript,

1 as well, as that point, so I have her make some copies for me
2 before Thursday?

3 MR. SEARS: I don't think so. I was thinking
4 more in terms of when we get around to arguing this, and
5 presuming that you would consider taking this under
6 advisement for a period of time. And a lot of it has to do
7 with the testimony of Dr. Keen, which has now been sometime
8 ago. And what keyed us to this were some things that were in
9 the State's memo that caused us to go back and look at what
10 we think Dr. Keen said in the transcript.

11 THE COURT: Especially Reference 6?

12 MR. SEARS: That's correct.

13 But there are places in there in which we
14 looked at what Mr. Echols said and also what Deputy Brown
15 said -- Detective Brown -- Deputy Brown said. And there is
16 probably a dozen places, and we may identify more the next
17 day or two as we look more carefully at what the State has
18 said here.

19 THE COURT: I wouldn't mind if you want to do
20 it that way. That's fine. Probably helpful.

21 MR. SEARS: Okay. "That way" being make the
22 references or make the copies?

23 THE COURT: The references, not the copies.

24 MR. SEARS: Thank you. The other thing that
25 occurs to me, because we have had somewhat of an unpleasant

1 history in this building on this issue is that we are running
2 up against the 60 days, the magic 60 days on our release
3 motion. And the last thing we want to do is put the Court in
4 a position of having to rule before you are ready to rule.
5 And I don't know exactly the best way to do that, but if the
6 Court wanted to -- in the tradition of Judge Greer, order
7 some more briefs or do something to extend the 60 days or
8 something like that or set oral argument on it to get
9 yourself enough time to do what you need to do to consider
10 that, along with these other issues, we are not opposed to
11 that.

12 THE COURT: We are coming up on that. I think
13 my 60th day is actually Monday.

14 MR. SEARS: That was our count.

15 THE COURT: Because Saturday is the actual
16 60th day.

17 So I, in particular, was -- when I took
18 it under advisement, knew that we were having a Chronis
19 hearing. And a big element in my decision, I think, is if
20 the death penalty is off the table or -- well, that is a
21 major change in the circumstances of the case that might
22 warrant some reconsideration of the issue.

23 If the death penalty is still on the
24 table, I am not sure that I am going to change where I am now
25 on that, and that is part of -- a major part of what I am

1 thinking.

2 MR. SEARS: I guess there is a middle ground,
3 as there always is.

4 THE COURT: I recognize that there is a middle
5 ground, as well.

6 MR. SEARS: Just one thought might be to set
7 it for some brief status hearing or something past the 60th
8 day, and I would be willing to agree that that would extend
9 the Court's time to consider the matter, if you are
10 comfortable with that. I don't know that the State would
11 oppose that.

12 THE COURT: Not especially comfortable with
13 it, Mr. Butner?

14 MR. BUTNER: Judge, if you need more time,
15 that is fine. I just don't want to do something that is sort
16 of strangely artificial, either.

17 THE COURT: Yeah. I don't believe in that
18 very much.

19 MR. SEARS: Judge Abbey used to -- when he was
20 here that year when Mr. Hammond was trying the Spurlock case,
21 and had our judge up there that whole year, Judge Greer
22 calendared everything for 55 days and ordered a new round of
23 hearings every 55 days, and went an entire year without
24 having to rule a single case -- which got him a job on the
25 Court of Appeals. I see that as a cause and effect.

1 THE COURT: That and some political
2 repercussions of the northeastern part of the state at the
3 time.

4 MR. SEARS: And his willingness to bet heavily
5 on his own terrible golf game.

6 THE COURT: May he rest in peace, too.

7 MR. SEARS: That's another one.

8 THE COURT: Let me think about that. And I --
9 I don't really want to engage in artificial postponing of
10 decision. But if I think, after listening on Thursday, that
11 I need some additional time, I will get back with you.

12 MR. BUTNER: That would be fine.

13 MR. SEARS: Thank you. We are just putting
14 that out there.

15 THE COURT: Thank you for the thought.

16 We haven't had any mental health
17 evaluations in the case, and to raise a different topic with
18 you.

19 MR. SEARS: None under the rule that would be
20 the subject of litigation at this point. The position in our
21 defense is that Mr. DeMocker was not here to do this.

22 THE COURT: Do you think I need to do an
23 evaluation for a death penalty case to ascertain that the
24 defendant, who seems very competent and intelligent to me, is
25 perfectly within his gourd?

1 MR. SEARS: I would be real careful here,
2 Judge, because I did the direct appeal to the Arizona Supreme
3 Court in the Kayer case, and there was an unfortunate
4 discussion on the record in Kayer by the Court and counsel
5 about how they all thought that Mr. Kayer was competent and
6 filing things.

7 THE COURT: Well, that's why I'm asking.

8 MR. SEARS: I took a very different view when
9 I did the appeal and cited on the record some things that
10 Mr. Kayer said and did that I thought were contrary with
11 that.

12 Without expressing any opinion on our
13 client's competence at this point, I can say that we do not
14 contemplate bringing any proceeding under any of the mental
15 health rules for evaluation of our client, at this time, nor
16 do we think it's necessary at this point for the Court to
17 order something like that sua sponte.

18 THE COURT: Mr. Butner.

19 MR. BUTNER: Judge, I think that that's
20 something that we have to do now. Just a more or less --
21 like a screening, so to speak. I think that -- I haven't
22 dealt with this in a while, and I am asking the paralegal to
23 find that statute. I don't see any reason -- don't
24 misunderstand me, I don't see any Rule 11 type reason for an
25 examination of the defendant, but I just think we have to do

1 that.

2 MR. SEARS: Your Honor, I don't think Rule 11
3 or any other rule contemplates giving that option to the
4 State or even to the court sua sponte, unless there was
5 indication from something that this was an issue in the case.

6 I understand what Mr. Butner may be
7 suggesting is the State's concern, that if this case resulted
8 in conviction, this would be an argument that some
9 post-conviction relief counsel could make. But we have an
10 obligation to our client in this case. And because of the
11 reciprocal nature of these examinations, of the disclosure of
12 the State, decisions about this are not lightly entered into
13 by defense counsel in capital cases, and I can tell you that
14 that's the way that we approach this.

15 THE COURT: You are a very experienced capital
16 case attorney. Are you aware -- as is Mr. Hammond -- are you
17 aware of any requirements, case law, or rule in capital cases
18 that contemplates an evaluation be done in each and every
19 case?

20 MR. SEARS: Oh, no.

21 THE COURT: And I know we are cart before the
22 horse, because the Chronis hearing isn't over, but I wanted
23 to raise the issue.

24 MR. HAMMOND: I am relatively certain that
25 there is no requirement as a matter of capital litigation.

1 And having just done a couple of Rule 11 cases in the
2 non-capital area, but serious homicides, my experience is
3 that if there were a basis established -- and in fact, if
4 there was a basis, we would have an obligation, I think, to
5 bring it to the Court's attention, along with the State.

6 I think it's not too much to say that we
7 are doing our own internal assessment, as part of what we
8 think is our obligation as capital defense lawyers. But at
9 this point, in terms of the Rule 11 factors, his ability to
10 comprehend the issues and cooperate with his defense -- if
11 you would just release him, we could demonstrate to you how
12 cooperative he could be. I think it would be premature and
13 without foundation at this time.

14 THE COURT: In the sense that I haven't made
15 any ruling with regard to Chronis, I acknowledge it's
16 premature, but it is something I would like you to take a
17 look at and think about and make sure that we are not
18 traipsing down any bad road by not ordering it, based on my
19 observations of him being apparently competent in everything
20 and in every way that I have observed in the courtroom. Now,
21 I don't deal with him as you do with communications, and he
22 has not taken the stand, and not required to in any of the
23 proceedings, of course. But I just wanted to float that one
24 by you and make sure that I am in good standing with the
25 appeals courts.

1 MR. SEARS: Let me just amplify for a second
2 that as the three of us having all done capital cases in
3 other jurisdictions in Arizona, we all understand the ABA
4 guidelines and the U.S. Supreme Court cases circumscribe a
5 whole range of responsibilities and obligations. We haven't
6 talked about some of them today, about out of reach and
7 things like that.

8 But without question, the issue of your
9 own client's mental health, both currently his ability to
10 assist or to not assist, and his state of mind at the time of
11 the alleged offense, are things which are always in our mind,
12 as they should be, and are always the subject of different
13 kinds of evaluation and investigation. And Larry is correct
14 that if we had reason to believe that one or the other or
15 both of those circumstances were at issue, we would be
16 duty-bound to bring those issues to the Court's attention. I
17 can tell you that I am in a habeas corpus proceeding in
18 Federal Court in a capital case, and that was one of the
19 allegations, was that there was insufficient investigation
20 done about the defendant's mental health. So I know where
21 that leads.

22 THE COURT: Anything else on that issue,
23 Mr. Butner?

24 MR. BUTNER: No.

25 THE COURT: If you find something along those

1 lines that puts some burden on us -- me -- I will order that.

2 MR. BUTNER: Judge, it's just out of an
3 abundance of caution. The death penalty cases that I have
4 had lately, there's just been that initial screening. It's
5 just been automatic, so to speak. Like okay, fine. And I
6 understand why counsel don't want to put their client through
7 that, and I have no questions in my mind about Mr. DeMocker.
8 Okay? But it is what it is, as they say.

9 THE COURT: Okay. Mr. Sears, other issues you
10 wanted to take up?

11 MR. SEARS: No. I think my -- oh, Mr. Butner
12 was going to make a call and see if he was available on
13 December 9.

14 MR. BUTNER: I made it, and I am.

15 THE COURT: You are available?

16 MR. BUTNER: Yes.

17 THE COURT: Good. I suppose I ought to put
18 Judge Hess's bench back together, again. See you tomorrow at
19 9:00.

20 MR. SEARS: Right. So do we - So the 9th,
21 some amount of time on the 9th and also on the 15th?

22 THE COURT: Yeah. I will print out what I
23 have tomorrow and then plug you in someplace on the 9th. And
24 you can bring calendars so we can compare notes about if the
25 morning or afternoon is better or how much time.

1 MR. SEARS: We were in the process of
2 preparing an Omnibus Motion that will bring in a lot of
3 different issues, and we think that we would file it, and it
4 would otherwise be ready for hearing before the January
5 hearing dates. And I don't know whether the Court -- I don't
6 know if you are going to work, for example, between Christmas
7 and New Year's.

8 THE COURT: Hoping not to.

9 MR. SEARS: Okay. That makes several of us.

10 MR. HAMMOND: I actually think it's probably
11 better for us. We are all in midstream on this one.
12 Obviously, the Omnibus Motion is to us a very important one.

13 And we have -- we are doing some
14 statistical work that I think should have been done in
15 Arizona a long time ago, but I think it probably -- just in
16 terms of what we have learned in the last couple of days, I
17 think having that in January will probably --

18 THE COURT: Make more sense?

19 MR. HAMMOND: Probably. It is not something
20 that will be easily consumed in one bite, but I do think we
21 are probably just as wise to --

22 MR. BUTNER: I was looking forward to a
23 Christmas present.

24 MR. HAMMOND: Well, you may have it.

25 MR. BUTNER: You see I am being sarcastic, I

1 hope.

2 THE COURT: Tongue is firmly planted in cheek.

3 MR. HAMMOND: Judge, before we leave, I don't
4 want to belabor the Chronis thing, but one thing that I think
5 is bothering us is the pecuniary gain part of this. The
6 reason it troubles us as much as it does is that this just
7 doesn't feel like a pecuniary gain case.

8 MR. BUTNER: I just really thought we weren't
9 going to argue this today or any of these, Mr. Hammond. Come
10 on. I am sure it doesn't feel good to you.

11 MR. HAMMOND: I don't want it to feel good. I
12 want it to feel like something I've felt before, and this
13 doesn't feel like anything -- well, if this is trenching on
14 the time of the Court and Mr. Butner, then I will shut up,
15 but I --

16 MR. BUTNER: Well, nobody cares about my time.
17 And you don't, and I know that. But I do care about the
18 argument thing. I mean, you know, that is always the
19 problem.

20 THE COURT: Go back to the office, then, and
21 get their list of stuff.

22 MR. BUTNER: I put my call in. You know? We
23 got the wheels of justice, so to speak, are turning, I hope.

24 THE COURT: Okay.

25 MR. HAMMOND: I will hold my fire.

1 THE COURT: Okay.

2 MR. BUTNER: Thank you, sir.

3 THE COURT: Your guy on Thursday mainly has to
4 do with the pecuniary gain issue and Mr. Echols, I believe.

5 MR. SEARS: And witness killing.

6 THE COURT: But has to do with --

7 MR. SEARS: He is a financial -- he is a CPA
8 and financial forensics expert. And so he has many, if not
9 all of the same credentials as Mr. Echols has.

10 THE COURT: Mr. Echols took all of the day, I
11 think. Are we likely to go into Friday?

12 MR. SEARS: I don't know. I don't think my
13 direct examination -- I am doing my best to focus the direct
14 examination in the nature of rebuttal. That is why I am
15 really looking at what he is testifying -- for the most part
16 is rebuttal, without bringing in new information, except to
17 the extent that he can describe the independent work that he
18 has done to look at some of the issues that Mr. Echols and
19 the State has raised about Mr. DeMocker's finances and
20 Mr. DeMocker's conduct in the divorce case and with respect
21 to his tax returns.

22 THE COURT: I was trying to figure out what
23 the rest of the week holds in store, but I guess I will wait
24 to see whether we are going to have hearings also on Friday.

25 MR. SEARS: I don't think there is any benefit

1 to anybody in having Mr. Curry, our witness, just plow the
2 same field. I think he has -- we have provided the State
3 with a report that he has done that he attempted to focus on
4 his observations about the same things that Mr. Echols was
5 looking at, and also about what Mr. Echols said about those
6 things.

7 THE COURT: Okay. Thank you. I will see you
8 in the morning, nine o'clock.

9 MR. SEARS: Thank you.

10 (Whereupon, these proceedings were concluded.)

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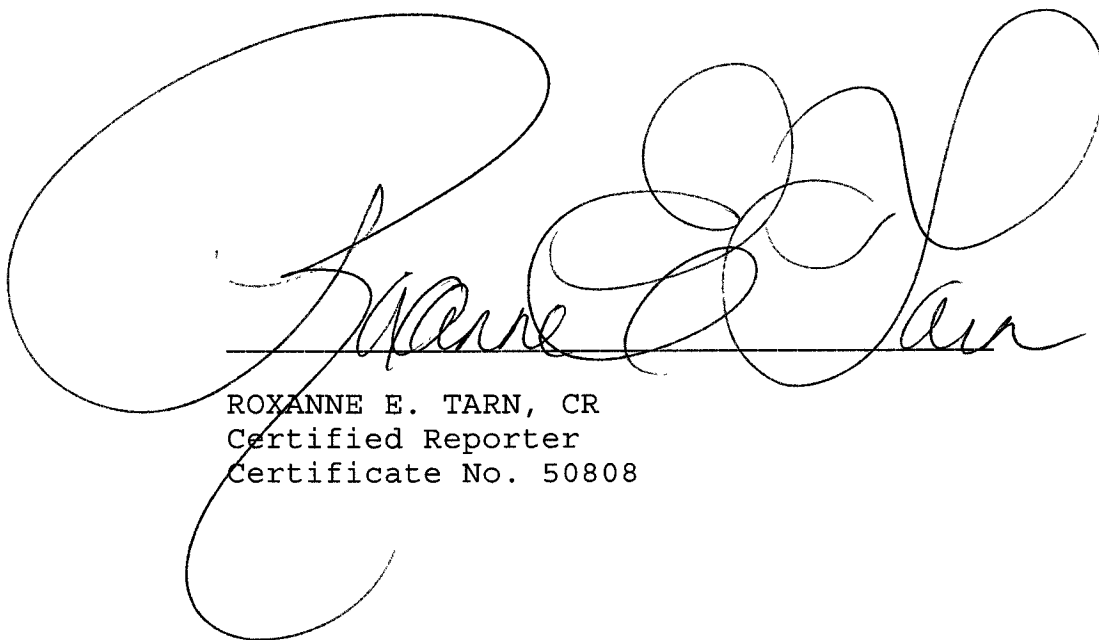
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C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter
in the State of Arizona, do hereby certify that the foregoing
pages 1 - 156 constitute a full, true, and accurate
transcript of the proceedings had in the foregoing matter,
all done to the best of my skill and ability.

SIGNED and dated this 7th day of January,
2010.



ROXANNE E. TARN, CR
Certified Reporter
Certificate No. 50808